No. 88-1-CFX
Status: GRANTED

Title: Consolidated Rail Corporation, Petitioner
v.
Railway Labor Executives' Association, et al.

Docketed:
June 30, 1988

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Morikawa,Dennis J.

Counsel for respondent: Mann,Lawrence M.

Entry	Date	Note	Proceedings and Orders
1	Jun 30 1988	G	Petition for writ of certiorari filed.
2	Jul 28 1988		Brief of respondents Railway Labor Executives' Assn., et al. in opposition filed.
3	Aug 3 1988		DISTRIBUTED. September 26, 1988
4	Sep 7 1988	X	Reply brief of petitioner Consolidated Rail Corp. filed.
5	Oct 3 1988		Petition GRANTED.
			**********
7	Nov 8 1988		Order extending time to file brief of petitioner on the merits until November 28, 1988.
8	Nov 9 1988		Record filed.
		*	Certified copy of briefs and parital proceedings received.
9	Nov 18 1988		Record filed.
		*	Certified copy of original record and certified copy ofdocket entries received from USDC E.D. Penna.
10	Nov 28 1988		Joint appendix filed.
11	Nov 28 1988		Brief of petitioner Consolidated Rail Corp. filed.
12	Nov 28 1988		Brief amicus curiae of National Railway Labor Conference filed.
13	Nov 28 1988		Brief amicus curiae of United States filed.
15	Dec 8 1988		Order extending time to file brief of respondent on the merits until January 11, 1989.
16	Dec 23 1988		Brief amicus curiae of Allied Pilots Association filed.
17	Jan 6 1989		Order further extending time to file brief of respondent on the merits until January 17, 1989.
18	Jan 6 1989		SET FOR ARGUMENT TUESDAY, FEBRUARY 28, 1989. (1ST CASE.)
19	Jan 17 1989		Brief of respondent RLEA filed.
20	Jan 27 1989		CIRCULATED.
21	Feb 16 1989	X	Reply brief of petitioner Consolidated Rail Corp. filed.
22	Feb 28 1989		ARGUED.

88-1

No. 87-____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HARRY A. RISSETTO
1800 M Street, N.W.
Washington, DC 20036

DENNIS J. MORIKAWA*
MICHAEL J. OSSIP
SARAH A. KELLY
2000 One Logan Square
Philadelphia, PA 19103

BRUCE B. WILSON
JEFFREY H. BURTON
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Of Counsel:

MORGAN, LEWIS & BOCKIUS

June 30, 1988

* *Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

QUESTION PRESENTED

Whether a railroad's inclusion of a drug test in the urinalysis component of its fitness for duty medical examinations constitutes a major dispute under the Railway Labor Act where the railroad has a long-standing and unchallenged policy of performing medical examinations which have included urinalyses.

PARTIES TO PROCEEDINGS BELOW AND RULE 28.1 STATEMENT

Petitioner is Consolidated Rail Corporation. Respondents are Railway Labor Executives' Association; American Railway and Airway Supervisors Association, Division of BRAC; American Train Dispatchers Association; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood of Railway Carmen of the United States and Canada; Hotel Employees & Restaurant Employees International Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Longshoremen's Association; National Marine Engineers' Beneficial Association; Seafarers International Union of North America; Sheet Metal Workers International Association; Transport Workers Union of America; United Transportation Union.

Petitioner has no parent corporation(s). It has the following affiliates and non-wholly-owned subsidiaries:

The Akron & Barberton Belt Railway Company

Albany Port Railway Corporation

American Casualty Excess Insurance, Ltd.

The Belt Railway Company of Chicago

Chicago & Western Indiana Railway Company

Indiana Harbor Belt Railroad Company
Calumet Western Railway Company

The Lakefront Dock and Railroad Terminal Company

The Monongahela Railway Company

Nicholas, Fayette & Greenbrier Railroad Company

Peoria & Pekin Union Railway Company

Pittsburgh Chartiers & Youghiogheny Railway Company

Railroad Association Insurance, Ltd.

Trailer Train
Calpro Company
Railbox Company
Trailer Train Finance, N.V.

Transportation Data Xchange, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

No. 87-___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Consolidated Raii Corporation ("Conrail") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on April 25, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 846 F.2d 1187 (3d Cir. 1988), and is reproduced in the Appendix at A-1 to A-19. The Order of the United States District Court for the Eastern District of Pennsylvania is unreported and is reproduced in the Appendix at A-23 to A-26.

JURISDICTION

The decision of the Court of Appeals was entered on April 25, 1988. On May 6, 1988 the Court of Appeals

stayed the issuance of its mandate until June 1, 1988. On June 6, 1988, the Court of Appeals extended the stay of its mandate until June 10, 1988. On June 9, 1988, the Court of Appeals extended the stay until June 30, 1988. A-20 to A-22. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)(1982).

STATUTE INVOLVED

Sections 2, 3 and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, 153 and 156 (1982), are set forth in the Appendix at A-27 to A-47.

STATEMENT OF THE CASE

This case involves the important question of the ability of rail and airline carriers to implement and maintain medical fitness for duty policies which have for decades been a critical component of the safe operation of the railroads and airlines.[1] Since its very inception, Conrail has had a policy of conducting routine medical examinations of its employees to determine their fitness for duty. This policy has, for years, included diagnostic tests including urinalyses designed to detect medical conditions which could limit or restrict employees in the safe performance of their jobs. Conrail has, without challenge from the unions, regularly amended and modified such policies including adding new diagnostic tests in order to remain current with changing medical technology. Employees found to be unfit to perform their jobs safely have always been subject to removal from service by Conrail's medical department.

The necessity of these medical fitness for duty determinations was magnified by the tragic accident which occurred at Chase, Maryland on January 4, 1987 when an Amtrak passenger train collided with Conrail

1. Both railroads and airlines are subject to the provisions of the Railway Labor Act, 45 U.S.C. §§151 et seq. and 181 (1982).

locomotives killing sixteen persons and injuring 174 others. The subsequent determination that the Conrail engineer and brakeman had been using marijuana prior to the accident heightened the need for Conrail to enhance its response to the problem of drug and alcohol abuse by its employees.[2] As a result, on February 20, 1987, Conrail announced that a drug test would be added to the urinalysis portion of its periodic and return to work fitness for duty medical examinations.

Despite Conrail's long-standing and unchallenged policy of performing fitness for duty medical examinations, the Third Circuit found that the addition of a drug test to the existing urinalysis was a "major" dispute under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* (1982). The court concluded that Conrail's addition of the drug test to the urinalysis component of the medical examination constituted a change in the terms and conditions of employment which Conrail could not impose without first bargaining with the unions.

The Third Circuit's decision is in direct conflict with the decisions of the United States Courts of Appeals for the Seventh and Eighth Circuits in *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987), and *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986). The Seventh and Eighth Circuits held on virtually identical facts that the addition of a drug test to the existing urinalysis component of a medical fitness for duty examination was a "minor" dispute under the RLA. Therefore, the railroads in those cases were permitted to unilaterally add a drug test to

2. The National Transportation Safety Board later concluded that the Chase, Maryland accident was caused by the Conrail engineer's use of marijuana. Department of Transportation, Notice of Proposed Rulemaking, Railroad Operating Rules; Random Drug Testing Program, 53 Fed. Reg. 16,640 (1988)(to be codified at 49 C.F.R. pts. 217, 219) (proposed May 10, 1988).

the routine urinalysis portion of their established medical examination programs without having to bargain with the unions over its implementation. Employees were, however, permitted to challenge the effect of these policies in accordance with the arbitration procedures mandated by the RLA.

The Third Circuit's decision creates an intercircuit conflict on an issue of substantial public importance — the ability of railroads and airlines to maintain, develop and improve medical programs to insure that all employees are fit for duty. The decision also places into irreconcilable dispute the ability of railroads and airlines to make critical fitness for duty determinations and, as a practical matter, makes it impossible for Conrail, which operates within the Third, Seventh and Eighth Circuits, to apply consistent medical standards on a system-wide basis.

I. Major v. Minor Disputes Under The Railway Labor Act.

The RLA was enacted by Congress in 1926 to restore harmony to labor-management relations in the railroad industry. The Act itself was the product of a joint effort by labor and management representatives to channel labor disputes into constructive resolution procedures as a means of avoiding interruptions to commerce and preventing strikes. *See Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 148-49 & n.13 (1969). The RLA provides for two distinct types of disputes: "major" disputes which involve contract formation, amendment or acquisition of new rights; and "minor" disputes, which involve the interpretation or application of an existing collective bargaining agreement. Both of these categories are "sharply distinguished." *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-723 (1945); *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 153-54 (1969); *Brotherhood of Locomotive Engineers v.*

Burlington Northern R.R., 838 F.2d 1087, 1089 (9th Cir. 1988), *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631).[3]

Major disputes involve "the formation of collective [bargaining] agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." *Elgin, Joliet & Eastern Ry.*, 325 U.S. at 723. The procedures under the RLA for resolving major disputes contemplate resort to an extensive mediation and conciliation mechanism and require the parties to resolve such disputes through negotiation, mediation and possible presidential intervention. *See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378, *reh'g denied*, 394 U.S. 1024 (1969); *Detroit & Toledo Shore Line R.R.*, 396 U.S. at 148-150. Coupled with this extensive bargaining obligation is the obligation on the part of both parties to maintain the status quo until the process has been exhausted, a process which has been described by this Court as "almost interminable." *Detroit & Toledo Shore Line R.R.*, 396 U.S. at 149, 150-53. The purpose of these exhaustive requirements is that if a major dispute cannot be resolved, the union can strike in support of its position. *National Ry. Labor Conference v. International Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741, 745 (7th Cir. 1987).

By contrast, "minor" disputes "contemplate the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper

---

3. The terms "major" and "minor" disputes do not appear in the RLA, but are the product of judicially created categories. *See Elgin, Joliet & Eastern Ry.*, 325 U.S. at 723-24.

application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, Joliet & Eastern Ry.*, 325 U.S. at 723.[4] The resolution of minor disputes is brought about through a formal grievance process subject to binding arbitration by the National Railroad Adjustment Board ("NRAB"), 45 U.S.C. § 153. Resolution of grievances in this process does not entitle the union to strike. 325 U.S. at 726.

In determining whether a dispute is "minor" the court's obligation has generally extended to a determination of whether the position of one of the parties can "arguably" be justified by the existing agreement. *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 544 (3d Cir. 1974). It is not necessary that the terms of a collective bargaining agreement be set forth in a written document; they can be inferred from habit and custom. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142 (1969); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d at 1091-92. Past practice, accepted or acquiesced in by a party, becomes part of the contract. *Maine Central R.R. v. United Transp. Union*, 787 F.2d 780, 783 (1st Cir.), *cert. denied*, 107 S. Ct. 169 (1986). So long as the parties' interpretation of the agreement is "even argua-

4. The "omitted case" refers to rights firmly grounded in past practice or prior courses of dealing and can include a situation "arguably within the scope of residual managerial prerogative left with the [carrier] by the agreement." *Airline Flight Attendants v. Texas Int'l Airlines, Inc.*, 411 F. Supp. 954, 959 (S.D. Tex. 1976), *aff'd mem.*, 566 F.2d 104 (1978), *citing United Industrial Workers of Seafarers' Int'l Union v. Board of Trustees of Galveston Wharves*, 351 F.2d 183, 188 (5th Cir. 1965). *See also Railway Labor Executives' Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 430 F.2d 994, 996-97 (9th Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).

ble" or if the claims are not "frivolous" or "obviously insubstantial," the dispute will be deemed "minor."[5]

"The fundamental inquiry in deciding whether to assume jurisdiction to grant injunctive relief is not to interpret the contract; rather, the court must decide whether the asserted contractual defense is frivolous." *United Transp. Union General Committee of Adjustment v. Baker*, 499 F.2d 727, 730 (7th Cir.), *cert. denied*, 419 U.S. 839 (1974). Further, in cases where there is some doubt regarding whether a dispute is a "minor" dispute, it should be treated as "minor" subject to the mandatory and exclusive jurisdiction of the NRAB:

> Since the machinery for resolving major disputes is conciliatory rather than binding, a major dispute can escalate into a strike, which in the transportation industries — producers of a nonstorable service

5. *See, e.g., International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794 (5th Cir. 1988) ("arguably justified"); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087, 1111 (9th Cir. 1988) ("arguably justified"), *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631); *National Ry. Labor Conference v. International Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741, 746 (7th Cir. 1987) (minor unless claim is "frivolous" or "obviously insubstantial"); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986) ("reasonably susceptible" to asserted interpretation); *Maine Central R.R. v. United Transp. Union*, 787 F.2d 780, 782 (1st Cir.) (court's role is limited to determining whether carrier's assertion is "even arguable"), *cert. denied*, 107 S. Ct. 169 (1986); *Brotherhood Ry. Carmen v. Norfolk & Western Ry.*, 745 F.2d 370 (6th Cir. 1984) ("arguably justified" or not "obviously insubstantial"); *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 948 (2d Cir. 1983) (not "obviously insubstantial"), *aff'd in part and rev'd in part on other grounds, sub nom., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *International Brotherhood of Elec. Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1173 (D.C. Cir. 1972) ("reasonably susceptible" to carrier's contention), *cert. denied*, 411 U.S. 906 (1973).

— can be a calamity. So it is no surprise that, when in doubt, the courts construe disputes as minor.

Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry., 768 F.2d 914, 920 (7th Cir. 1985). *See also Brotherhood Ry. Carmen v. Norfolk & Western Ry.*, 745 F.2d 370, 374-75 (6th Cir. 1984); *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 947-49 (2d Cir. 1983), *aff'd in part and rev'd in part on other grounds, sub nom., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d at 705 ("[b]ecause a major dispute can escalate into a strike, if there is any doubt as to whether a dispute is major or minor a court will construe the dispute to be minor"); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d at 1022 (referring to the "relatively light burden which the railroad must bear in showing that its actions are at most minor changes and thus within the status quo").

II. Conrail's Fitness For Duty Medical Program.

Since its inception, Conrail has conducted routine medical examinations to determine employees' fitness for duty. These medical examinations have been conducted periodically and upon an employee's return to duty following an extended absence. Over the years, Conrail has, without any bargaining or request to bargain by the unions, revised, modified and changed these medical standards to reflect advances in medical technology. A-48 to A-49. The procedures governing these medical examinations are set forth in Conrail's Medical Standards Manual. A-49. The examinations have routinely included a urinalysis for blood sugar and albumen. A-49, A-58 to A-59. A drug test was also included as part of the urinalysis when, in the judgment of the examining physician, the employee may have been using drugs. A-59.

Employees who undergo a periodic or return to duty physical examination and who fail to meet Conrail's established medical standards are routinely held out of service without pay until the condition is corrected or eliminated. Thus, employees have been held out of service until their vision was corrected or their blood pressure or elevated blood sugar was reduced. A-50 to A-51.

Beginning in February, 1987, Conrail added a drug screen to the existing urinalysis component of its routine medical examinations. If drug use was detected in any of these medical examinations, an employee would not be allowed to return to work unless he could provide a negative drug test within forty-five days at a medical facility recommended by Conrail's Medical Director. An employee whose first test was positive would be given the opportunity for an evaluation by Conrail's Employee Counseling Service. If the evaluation revealed evidence of possible drug addiction and the employee agreed to enter an improved treatment program, the employee would be given an extended period of one hundred twenty-five days to provide a negative drug test result. A-50 to A-51.

Separate and apart from medical fitness for duty determinations, Conrail has for many years enforced a disciplinary rule known as "Rule G" which prohibits the use or possession of "intoxicants, narcotics, amphetamines or hallucinogens" by employees on duty or the use of such substances by employees subject to duty, and which requires employees under medication to be certain that such use will not affect the safe performance of their duties. A-57. Conrail has traditionally relied upon two methods of detecting Rule G violations — supervisory observation and encouraging employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine, or other diagnostic tests. A-58.

The dramatic increase in drug or alcohol related accidents in the railroad industry and particularly the tragic accident at Chase, Maryland, caused Conrail to focus more critical attention on its medical fitness for duty determinations through enhanced diagnostic measures supervised by its Medical Department.[6] On February 20, 1987 Conrail announced that a drug test would be included as part of the already existing urinalysis required in all periodic and return to duty medical examinations or any periodic-special examinations as required by physicians.[7]

III. Decisions Of The Courts Below.

Claiming that Conrail's implementation of such testing was a new term or condition of employment which required Conrail to bargain prior to its implementation, the Railway Labor Executives' Association and unions representing Conrail employees ("RLEA" or "unions") filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking to

6. The tragic consequences of drug and alcohol abuse in the transportation industry are vividly recited both in the Department of Transportation's Notice of Proposed Rulemaking, 53 Fed. Reg. 16,640 (1988) (to be codified at 49 C.F.R. pts. 217, 219) (proposed May 10, 1988), and in the petitions for writs of *certiorari* filed in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988) and *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631).

7. Drug screen urinalysis as part of medical fitness for duty determinations are standard in the industry and encouraged by the Federal Railroad Administration. "The FRA notes that it has long encouraged railroads to test employees in the context of its medical qualification programs, with the test results to be used exclusively in the context of those programs." Department of Transportation's Notice of Proposed Rulemaking, *supra* n.5, 53 Fed. Reg. 16,647 (1988).

enjoin Conrail from requiring employees represented by the RLEA unions to undergo drug testing.

Based on a joint stipulation of the parties and uncontradicted facts in the form of affidavits, answers to interrogatories and responses to requests for production of documents, the district court rejected the RLEA's contention that addition of a drug test to the urinalysis component of Conrail's existing medical program constituted a "new" policy which required Conrail to bargain with the unions In its order dismissing the complaint, the court noted that Conrail had always required all hourly employees to undergo periodic and return to duty physical examinations including urinalyses, and that drug tests had in the past been used by Conrail where drug use was suspected or where prior drug problems existed. A-24. The court also found that the unions had acquiesced in Conrail's procedures to ensure an employee's fitness for the job because the unions had always recognized Conrail's right to remove from service employees who were unable to perform their duties safely. Therefore, the court concluded that Conrail's drug testing program was simply a "further refinement" of that practice and was consistent with its right to ensure the safety of its operations. A-25. On the basis of these findings, the court held that Conrail's decision to implement the drug test was a "minor" dispute under the Railway Labor Act because such decision was "arguably justified" by its long-standing medical fitness for duty policy. *Id.*

On appeal, the Third Circuit reversed the district court and remanded the case for further proceedings consistent with its opinion. A-19. While recognizing that two prior cases, *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987), and *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986), both dealing with medical examination

programs virtually identical to that presented in this case, had concluded that the addition of drug tests to the urinalysis component of existing fitness for duty medical examinations was a "minor dispute" under the RLA, the Third Circuit concluded that "[t]he absence of any uniformity in interpretation by the other courts reinforces our responsibility to make an independent analysis of the applicable law to the undisputed facts." A-14.

The Third Circuit announced that the standard to be applied in determining whether a minor dispute existed in this case was whether ". . . it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue." A-14. In short, the court held that it must determine "whether the existing agreement arguably admits of an implied term encompassing the new drug screening" [citations omitted]. *Id.*

The court relied on the reasoning of the dissenting opinion in *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1025 (8th Cir. 1986) (Arnold, J. dissenting in part), by reading that opinion to find that " . . . whether the testing was characterized as a medical or disciplinary matter, the medical testing program could result in an employee's being fired without any prior suspicion of drug use." A-13 to A-14. The Third Circuit's reliance on the above reasoning evidences its belief that because drug use, as distinguished from any other detectable medical condition which could limit an employee's fitness for duty, was more "controversial" and "poses serious ethical and practical dilemmas as well," A-16, there could be no "meeting of the minds" on drug testing without evidence of a specific agreement between Conrail and the unions regarding such testing. In so holding, the court disregarded the more than ten year unchallenged practice by Conrail of unilaterally implementing, and from time to time altering and modifying, existing fitness for duty determinations which had always included urinalyses and in some cases drug testing.[8]

On the basis of the above, the Third Circuit concluded that, despite Conrail's long-standing prerogative of setting and maintaining medical fitness for duty standards, the addition of a drug test to the existing urinalysis component of Conrail's medical fitness for duty policy was not "arguably justified" by the prior practice.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Decision That Conrail's Addition Of A Drug Test To Its Fitness For Duty Medical Examinations Constituted A Major Dispute Under The Railway Labor Act Is In Direct Conflict With Decisions Of The Seventh and Eighth Circuits On The Identical Issue.

The Third Circuit decided that Conrail's addition of a drug test to the urinalysis component of its fitness for duty medical examination constitutes a major dispute under the Railway Labor Act. The Third Circuit reached this conclusion despite prior decisions to the contrary by both the Seventh and Eighth Circuits involving identical facts and issues. The Third Circuit's decision has therefore created a conflict among the courts of appeals on this issue.

In the Eighth Circuit case, *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986), Burlington

---

8. While the Third Circuit acknowledged that in 1984 Conrail issued a new Medical Standards Manual requiring a drug screen to be carried out in connection with all periodic examination urinalyses, the court apparently found it significant that such screening was performed in only one of its four administrative regions, the Eastern Region, but was discontinued for budgetary reasons after six months. Without any basis in fact in the record, the court concluded that although such testing was performed for over six months in Conrail's entire Eastern Region, "uniform testing" was ". . . without the apparent knowledge or agreement of the Unions. . . ." A-15.

Northern ("BN"), like Conrail, had an unchallenged past practice of "requiring employees to submit to periodic and comprehensive medical examinations in order to ensure all employees are fit for duty. . . ." 802 F.2d at 1024. BN's medical examination policy was almost identical to Conrail's and had "always included laboratory examination of urine and blood samples." Moreover, the only change that BN made was simply to add a drug test to the urinalysis portion of its medical examination. *Id.*

The Eighth Circuit, after extensively analyzing the application of the standard for determining major and minor disputes, concluded that BN's addition of drug testing to its fitness for duty medical determinations was a minor dispute. The court found that the unions had never challenged BN's right to establish fitness for duty standards or its right to ensure the safety of its operations "by removing from service any employee who is unable to perform his duties safely." 802 F.2d at 1024. Therefore, the court concluded, "all that is involved . . . is the extent to which the urinalysis component of these [fitness for duty] examinations may be refined in order to predict safe employee performance." *Id.* The court found that in addition to the fact that the underlying purpose of the medical examination—to determine fitness for duty—remained the same as before the drug test was added, it was not unreasonable to assume that fitness for duty standards might change with the times. On the basis of these findings, the Eighth Circuit held that BN's action was arguably justified by its past practice of controlling fitness for duty standards and therefore constituted a minor dispute which should be submitted to the National Railroad Adjustment Board.

In the Seventh Circuit case, *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987), the court reached the same conclusion based on similar reasoning. Norfolk and Western's ("N&W") practice, unchallenged by the union for twenty years, had been to require employees to provide a urine sample

during regular and return to work medical examinations. 833 F.2d at 702. In 1984, N&W added a drug test to its already existing urinalysis. The Seventh Circuit found that the parties' collective bargaining agreements, though silent on the issue, encompassed the past practice of fitness for duty medical examinations. 833 F.2d at 706. This past practice, the court found, accorded N&W the unilateral authority to determine the appropriate tests to include in the required medical examinations. *Id.* Thus, the addition of drug testing to fitness for duty examinations was found to be arguably justified by the parties' past practice.

The decisions by the Seventh and Eighth Circuits, which dealt with identical factual situations to that of Conrail, concluded that the addition of a drug screen to an existing urinalysis component of a periodic fitness for duty medical examination was not a new condition of employment but was arguably justified by the railroads' prior practices. Finding that the underlying purpose of the medical examinations was to ensure the fitness of employees for duty, both the Seventh and Eighth Circuits concluded that a drug screen was nothing more than a refinement of the prior techniques utilized by the railroads' medical departments. Although both courts recognized that employees could be removed from service based on such medical determinations, this did not elevate these issues to "major" disputes.

The Seventh and Eighth Circuit decisions stand in sharp contrast to the decision by the Third Circuit in this case. Conrail's medical fitness for duty policies had a similar history and contained virtually identical provisions to those involved in the Seventh and Eighth Circuit decisions. Each railroad had for a number of years conducted periodic and return to duty physical

examinations. Over the years, Conrail unilaterally, without any bargaining or request to bargain, revised, modified or changed these medical standards to reflect advances in medical science and medical technology. A-48.

Notwithstanding the striking similarities between the medical policies and the drug tests which were added in each case, the Third Circuit reached a completely opposite conclusion from those reached by the Seventh and Eighth Circuits. Despite recognizing that the Seventh and Eighth Circuits were presented with "issues almost identical to those we confront here," A-12, the Third Circuit went on to ignore those decisions based on a perceived "absence of uniformity in interpretation by the other courts. . . ." A-14.

The conflict created by the decisions of the Third, Seventh and Eighth Circuits must be directly addressed by this Court. By reaching a conclusion different from that of the Seventh and Eighth Circuits, the Third Circuit has injected confusion into an issue that should be straightforward under the "major-minor" dispute standard of the RLA. The effect of this conflict among the circuits is that railroads and airlines subject to the jurisdiction of the Seventh and Eighth Circuits will be able to implement fitness for duty drug testing policies under the RLA's minor dispute procedures, while those subject to the jurisdiction of the Third Circuit will have to proceed through the RLA's exhaustive bargaining processes before implementing the same drug testing. Railroads and airlines in the Third Circuit will be delayed for a substantial period of time not only in implementing drug testing, but could be prevented from making any modifications to medical fitness for duty determinations without first bargaining with the unions.

There is no certainty that further appellate court decisions will resolve the conflict created by the Third Circuit's opinion, and in the time spent waiting for such decisions, public safety will be seriously threatened by

the problem of drug abuse among railroad employees. Given the urgent nature of the safety threat to railroad employees and the general public posed by drug abuse among railroad employees, this Court must not wait to decide this issue.

II. The Court Below Ignored Established Supreme Court Precedent By Relying Upon National Labor Relations Act Principles To Determine This Important Issue Under The Railway Labor Act.

In determining whether Conrail's use of drug testing procedures constituted a minor dispute or major dispute under the RLA, the Third Circuit stated that it was applying the following standard:

> [I]f the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial', the controversy is [a minor dispute] within the exclusive province of the National Railroad Adjustment Board.

A-9, *citing Local 1477 United Transp. Union v. Baker*, 482 F.2d 228, 230 (6th Cir. 1973). The "arguably justified" or "not obviously insubstantial" standard has been uniformly applied by the courts of appeals in recognition of the unique procedures established by the RLA for the resolution of labor-management disputes. *See* cases cited at note 5, *supra*.

Although the Third Circuit identified the correct test under the RLA, it proceeded to ignore that test, as well as established precedent of this Court, by relying upon principles derived under the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.* (1973). Specifically, the Third Circuit relied upon a "Guideline Memorandum" prepared by the General Counsel of the National Labor Relations Board ("NLRB") in September of 1987. NLRB General Counsel Memorandum 87-5, 4

Lab. L. Rep. (CCH) ¶ 9344 (1987). In analyzing the major-minor dispute issue under the RLA, the Third Circuit noted the critical importance of the General Counsel's "Guideline Memorandum" to its decision as follows:

> We regard it as *particularly significant* that the General Counsel of the National Labor Relations Board has taken the position that drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the National Labor Relations Act. *See* National Labor Relations Board, Office of the General Counsel Mem. GC 87-5 (Sept. 8, 1987), *reprinted in* Daily Labor Report (BNA), No. 184 at D-1 (Sept. 24, 1987) ("When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination.")

A-16 to A-17. (emphasis added).

Immediately following the foregoing quotation, the court concluded that, because Conrail could not point to any "existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed," its use of drug testing procedures constituted a major dispute under the RLA. A-17. Thus, in assessing Conrail's actions, the Third Circuit applied NLRA principles of "clear and unmistakable waiver" and "mandatory subject of bargaining" instead of determining whether Conrail's action was "arguably justified" by its collective bargaining agreements, past practices, habits and customs. *See Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142 (1969). Instead of applying the relatively light

burden uniformly acknowledged by other courts of appeals in determining whether a dispute is major or minor, the Third Circuit required Conrail to prove the existence of an express contractual agreement giving it the right to proceed with drug testing, an analysis that is more apt in determining bargaining obligations under the NLRA. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (a union's waiver of a statutory right under the NLRA will not be found unless "the undertaking is 'explicitly stated.' ").

By incorporating the NLRA's "mandatory subject of bargaining" and "clear and unmistakable waiver" analyses into the RLA, the Third Circuit acted directly contrary to this Court's admonition that "the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, *reh'g denied*, 394 U.S. 1024 (1969).

Indeed, this Court has often expressed its reluctance to apply the substantive policies derived under the NLRA to the unique structure established by the RLA. *See, e.g., Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 107 S. Ct. 1841 (1987) (NLRA principles of secondary picketing are not applicable to the RLA); *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 391 ("although, in the absence of any other viable guidelines, we have resorted to the NLRA for assistance in mapping out very general boundaries of self-help under the Railway Labor Act, there is absolutely no warrant for incorporating into that Act the panoply of detailed law developed by the National Labor Relations Board and courts under § 8(b)(4)"). This has been particularly true where the issues under the two statutes have involved the scope of collective bargaining. *See, e.g., Chicago & North Western Ry. v. United Transp. Union*, 402 U.S. 570, 579

n.11 (1971) ("parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes"); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686-87 & n.23 (1981), *citing Chicago & North Western Ry. v. Transp. Union*.

The Third Circuit's application of the General Counsel's analysis of the obligation to bargain about drug testing under the National Labor Relations Act ignores the critical differences between the two statutes. The "arguably justified" standard uniformly applied by the courts in determining the existence of a major dispute that would be subject to collective bargaining differs fundamentally from the "clear and unmistakable waiver" analysis applied under the NLRA. Under the NLRA, a heavy burden is imposed upon the employer to demonstrate that the union has clearly and unmistakably waived the right to bargain with respect to a management decision. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952). On the other hand, under the RLA, the railroad employer need only sustain a "relatively light burden" of demonstrating that its action was "arguably justified" by the existing collective bargaining agreement. *Brotherhood of Maintenance of Way Employees, Lodge 16*, 802 F.2d at 1022. Moreover, the RLA permits an employer to rely far more heavily upon its past practices, customs and habits than does the NLRA. *Compare Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. at 153-54 *with NLRB v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969) *and Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013 (1982), *enforced*, 722 F.2d 1120 (3d Cir. 1983).

Review by this Court is necessary to remedy the Third Circuit's disregard for this Court's precedent disfavoring reliance upon NLRA principles in analyzing

issues under the RLA standards.[9] It is imperative that the public policy questions raised by drug and alcohol abuse in the railroad and airline industries be decided with reference to the unique procedures created under the RLA and not by substantive rules decided under an entirely different statutory scheme. This is particularly so where the sole "precedent" under the NLRA relied upon by the Court is an unreviewed "Guideline Memorandum" that does not even set forth the view of the National Labor Relations Board or a reviewing court of appeals, but merely the "position" of the chief prosecutor under the Act. This important issue must be determined based on precedent interpreting the RLA and not on the basis of an unreviewed advisory opinion interpreting the NLRA.

III. This Court Should Grant The Petition In This Case Irrespective Of Its Consideration Of The Petition For Certiorari Filed In Burlington Northern R.R. v. Brotherhood Of Locomotive Engineers, No. 87-1631, Oct. Term 1987.

Two courts of appeals have considered, with similarly inconsistent results, a related but distinctly different issue of whether a drug testing policy, explicitly designed as a method of enforcing Rule G, is a major or

---

9. In addition to the Third Circuit, the Fifth Circuit has also recently fallen into the trap of viewing the two statutes as coextensive. In *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794 (5th Cir. 1988), the Fifth Circuit, in a confusing opinion which applied standards for determining mandatory subjects of bargaining under the NLRA to a case arising under the RLA, held that Southwest's use of drug testing to enforce Rule G constituted a "mandatory subject of bargaining" under the RLA. Further compounding the confusion, the court held that the union had not clearly and unmistakably waived its right to bargain over drug testing. Finally, relying in part on the "Guideline Memorandum" prepared by the NLRB General Counsel, No. 87-5, 4 Lab. L. Rep. (CCH) ¶ 9344 (1987), the court concluded that Southwest's drug testing program created a "major" dispute.

minor dispute under the RLA. In a separate opinion in *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1023 (8th Cir. 1986), the Eighth Circuit determined that the enforcement of Rule G through post-incident drug testing was a minor dispute, because the railroad had merely altered the degree of particularized suspicion required before a test was conducted. By contrast, the Ninth Circuit subsequently held that the same railroad's Rule G drug testing policy was a major dispute because it was a more intrusive method of enforcing Rule G than had been applied in the past, and thus constituted a change in working conditions under the parties' agreement. *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631).

Irrespective of this Court's ultimate ruling on *certiorari* in *Burlington Northern*, the independent split among the Third, Seventh and Eighth Circuits regarding the RLA's application to medical fitness for duty testing policies compels immediate resolution by this Court. The prevalent practice in the industry includes both reasonable cause testing (which is involved in the *Burlington Northern* cases) as well as medical fitness for duty testing. The railway and airline industries need guidance with respect to the applicability of the RLA to both forms of testing.

If the Court determines that there is sufficient overlap between this case and *Burlington Northern*, Conrail requests that this case be held for consideration pending ultimate resolution of the petition for *certiorari* or of the merits in *Burlington Northern*. If this Court should defer consideration of *Burlington Northern* pending this Court's review of *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988), Conrail requests that the instant case also be held for consideration.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

HARRY A. RISSETTO
1800 M Street, N.W.
Washington, D.C. 20036

Of Counsel:
MORGAN, LEWIS & BOCKIUS

DENNIS J. MORIKAWA*
MICHAEL J. OSSIP
SARAH A. KELLY
2000 One Logan Square
Philadelphia, PA 19103

BRUCE B. WILSON
JEFFREY H. BURTON
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103

June 30, 1988

* Counsel of Record

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1289

RAILWAY LABOR EXECUTIVES' ASSOCIATION; AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, DIVISION OF BRAC; AMERICAN TRAIN DISPATCHERS ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; UNITED TRANSPORTATION UNION,

Appellants

v.

CONSOLIDATED RAIL CORPORATION

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civil No. 86-2698)

Argued November 3, 1987

Before: SLOVITER and BECKER,
Circuit Judges, and
COWEN, *District Judge**

(Opinion filed April 25, 1988)

Lawrence M. Mann (Argued)
Alper & Mann
Washington, D.C. 20001

Cornelius C. O'Brien, Jr.
O'Brien and Davis, P.C.
Philadelphia, PA 19102

Attorneys for Appellants

Dennis J. Morikawa (Argued)
Joseph J. Costello
Philadelphia, PA 19103

---

*Hon. Robert E. Cowen, United States District Court for the District of New Jersey, sitting by designation. Since the argument of this appeal, Judge Cowen has become a member of this Court.

Hermon M. Wells
Consolidated Rail Corporation
Philadelphia, PA 19104

Attorneys for Appellee

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

The issue presented by the Unions' appeal is whether the railroad's unilateral addition of a drug-screening component to its employees' medical examinations gives rise to a "minor" dispute under the Railway Labor Act over which the district court had no subject matter jurisdiction or to a "major" dispute which would entitle the parties to an injunction maintaining the status quo while they bargain over the change. This case concerns only the process pursuant to which drug screening may be introduced; it has nothing to do with whether drug screening is a good idea.

The district court concluded that the parties' prior practice with respect to medical examinations "arguably justified" the railroad's unilateral imposition of uniform drug screening and dismissed the Unions' action for want of jurisdiction. We will reverse.

I.

Background

A.

Facts

Plaintiffs, the Railway Labor Executives' Association, whose members head railway labor unions representing all crafts, and eighteen unions representing those crafts (hereinafter "Unions"), and defendant Consolidated Rail Corporation ("Conrail"), a railroad, have stipulated to the essential facts in this case. Since its formation in 1976, Conrail has required all employees to

undergo periodic physical examination at intervals varying between one and three years depending on the employee's age and job classification, and has required an examination upon the return to duty of all employees operating trains and engines who were out of service thirty days or longer and of all other employees out of service ninety days or longer "due to furlough, leave, suspension or similar causes." App. at 71. These examinations have routinely included urinalysis for blood sugar and albumin.

Conrail employees always have been subject to Rule G or its equivalent, an industry-wide rule, which prohibits the use or possession of "intoxicants, narcotics, amphetamines or hallucinogens" by employees on duty or the use of such substances by employees subject to duty, and which requires employees under medication to be certain that their safe performance of duty is not compromised. This rule has been enforced in the past principally by supervisory observation.

Conrail has routinely used drug screening urinalysis as part of the return-to-duty medical examination of any employee previously taken out of service because of a drug-related problem, and in both periodic and return-to-duty examinations, when the examining physician suspected drug abuse. In applying Rule G, Conrail "encourag[ed] employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine, or other diagnostic tests." *See* App. at 70; *cf. Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d 1087, 1089 (9th Cir. 1988) (railroad's employee suspected of drug use could avoid suspicion by voluntarily submitting to urinalysis); *Brotherhood of Maintenance of Way Employees v. Burlington Northern R. R. Co.*, 802 F.2d 1016, 1018 (8th Cir. 1986) (Arnold, J., for a unanimous court, concurring in part) (same).

In February 1986, the regulations of the Federal Railway Administration on "Control of Alcohol and Drug

Use in Railroad Operations" became effective. 49 C.F.R. §219 (1987). These regulations require post-accident drug screening by urinalysis, breathalizer and/or blood testing for all employees covered by the Hours of Service Act, 45 U.S.C. §61-66 (1982), *i.e.*, for operating employees.[1] Employees reasonably suspected of being under the influence of a prohibited substance may also be tested if they are involved in an operating rule violation or contribute to an accident. The application of these regulations to covered employees is not at issue on this appeal.

On February 20, 1987, Conrail announced its unilateral decision to include a drug screen as part of the urinalysis in all periodic and return-to-duty examinations, and in any special examinations deemed necessary by the physician after a return from a drug-related absence from duty. The Unions filed suit in district court alleging that Conrail's action violated Section 6 of the Railway Labor Act, 45 U.S.C. §156 (1982), and the Fourth Amendment's prohibition of unreasonable search and seizure and sought to enjoin Conrail from instituting the drug testing.

All parties moved for summary judgment. The district court, based on the facts set forth above, concluded that "Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy." *See Railway Labor Executives' Ass'n v. Conrail*, No. 86-2698, slip op. at 3 (E.D. Pa. April 28, 1987). It therefore found the dispute to be a "minor" one and dismissed the counts of the complaint

---

1. The Hours of Service Act applies to any "individual actually engaged in or connected with the movement of any train," but not to all railroad employees. 45 U.S.C. §61(b)(2). The Court of Appeals for the Ninth Circuit has recently held the Federal Railway Administration regulations to be unconstitutional under the Fourth Amendment. *See* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988). That issue is not before us.

based on the Railway Labor Act. The court also dismissed the Fourth Amendment claim on the ground that Conrail is not a government enterprise. *Id.* at 3-4. The Unions appeal only the order dismissing the Railway Labor Act counts.

The district court's conclusion that the drug-testing program constitutes a minor dispute is a legal determination. *Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d at 1089; *see Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747, 755 (3d Cir. 1977); *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 543-45 (3d Cir. 1974). *But see Railway Labor Executives' Ass'n v. Norfolk and Western Ry. Co.*, 833 F.2d 700, 707 (7th Cir. 1987). Because the district court dismissed the claims pursuant to the undisputed facts, its order, akin to a grant of summary judgment, is subject to plenary review. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *cf. Medical Fund-Philadelphia Geriatric Center v. Heckler*, 804 F.2d 33, 36 (3d Cir. 1986) ("dismissal of a complaint for lack of jurisdiction . . . raises a question of law subject to plenary review").

B.

Major and Minor Disputes

This court has recently had occasion to review the statutory background of the Railway Labor Act in *Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Co.*, No. 87-3797 (3d Cir. April 8, 1988). Therfore, we will only briefly discuss the provisions relating to major and minor disputes insofar as necessary to an understanding of the issue before us.

The Railway Labor Act ("RLA"), 45 U.S.C. §151 *et seq.*, was passed in 1926 to facilitate labor peace in the railroad industry, then the backbone of the American transportation system. *See* H.R. Rep. No. 328, 69th Cong., 1st Sess. 1-3 (1926) [hereinafter *1926 House Report*]; *Baker v. United Transp. Union*, 455 F.2d 149, 153-54 (3d Cir. 1971). In an unprecedented cooperative process, the Act was drafted by negotiators for railroad management and labor and presented to Congress as, essentially, a finished product. *See 1926 House Report* at 1, 3. In its original form, the Act did not provide compulsory arbitration for any claim; it worked instead to prevent strikes and lockouts by funneling disputes into "purposely long and drawn out [procedures], based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 246 (1966); *see Elgin, Joliet & Eastern R.R. v. Burley*, 325 U.S. 711, 725-27 (1945).

From the beginning, the Act made a distinction between disputes arising from grievances and the interpretation of a contract ("minor" disputes), on the one hand, and disputes arising from changes in pay rates, work rules and working conditions ("major" disputes), on the other. *See* Railway Labor Act, Pub. L. No. 257, §§3, First, 5(a)-(b), 6, 44 Stat. 577, 578-82 (1926); *see also Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R. Co.*, 353 U.S. 30, 35 (1957). Originally, minor disputes could be submitted to binding arbitration by "adjustment boards" composed of equal representatives of labor and management voluntarily established by the parties. The inability of the parties to agree to such boards and the deadlock in thousands of disputes before boards led Congress to amend the Act in 1934 to create the National Railroad Adjustment Board before which either side in a minor dispute can submit the issue to compulsory arbitration if the parties have not agreed on their own arbitrators. Railway Labor Act, ch. 691, §23, 48 Stat. 1185, 1189-93 (1934); *Trainmen*, 353 U.S. at 39; *Elgin*, 325 U.S. at 726. *See generally* Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 574-76 (1937). The carrier is not barred in minor disputes from introducing

the disputed change during the pendency of the arbitration proceedings. *See* 45 U.S.C. §153; *Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747, 754 n.6 (3d Cir. 1977); *cf.* 45 U.S.C. §156.

In contrast, parties to a major dispute have always been required to proceed through a more extensive mediation and conciliation mechanism as specified by sections 5 and 6 of the Act. 45 U.S.C. §§155-56; *see 1926 House Report* at 3-5; *Elgin*, 325 U.S. at 725-26. During this process, the parties are entitled to an injunction, if necessary, to preserve the status quo. *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 543 (3d Cir. 1974) (per curiam).[2]

The legislative history makes clear that labor's acquiescence to the RLA's procedure, including management's right to introduce changes in "minor" dispute situations, was dependent on the general understanding that "minor" disputes, with their attendant compulsory arbitration, were to be limited to "comparatively minor" problems, "represent[ing] specific maladjustments of a detailed or individual quality," *Elgin*, 325 U.S. at 724, in contrast to the "large issues about which strikes ordinarily arise," *id.* at 723-24. *See Trainmen*, 353 U.S. at 39 (general understanding was that compulsory arbitration covered only a "limited field"). *See generally* Garrison, *supra*, at 586-91 (describing typical minor disputes).

The classic explanation of the distinction between major and minor disputes appears in *Elgin*. Major disputes are said to arise "where there is no [collective

2. There are four, narrowly-cabined situations in which a district court may have subject-matter jurisdiction in a minor dispute despite non-exhaustion of the arbitration procedures. Childs v. Pennsylvania Fed. Bhd. of Maintenance of Way Employees, 831 F.2d 429, 437-38 (3d Cir. 1987). One of them, applicable "when resort to administrative remedies would be futile," Sisco v. Conrail, 732 F.2d 1188, 1190 (3d Cir. 1984), has been raised by the Unions here. Because of our disposition of the case, we do not reach this question.

bargaining] agreement or where it is sought to change the terms of one. . . . They look to the acquisition of rights for the future, not the assertion of rights claimed to have vested in the past." 325 U.S. at 723. Minor disputes arise where an existing agreement is being applied, "a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Id.*; *accord Trainmen*, 353 U.S. at 33 ("These are controversies over the meaning of an existing collective bargaining agreement, generally involving only one employee.")

We have adopted the following test to assist in determining whether the dispute is a minor one:

> [I]f the disputed action of one of the parties can "arguably" be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not "obviously insubstantial", the controversy is [a minor dispute] within the exclusive province of the National Railroad Adjustment Board.

Local 1477 United Transp. Union v. Baker, 482 F.2d 228, 230 (6th Cir. 1973), *quoted in United Transp. Union v. Penn Central*, 505 F.2d at 544; *accord, e.g., Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d 1087, 1091 (9th Cir. 1988). For this purpose, it is not necessary that the terms of a collective bargaining agreement governing relations under the Act be embodied in a written document; instead they may be inferred from habit and custom. *See Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142 (1969); *Brotherhood of Locomotive Eng'rs v. Burlington Northern*, 838 F.2d at 1091-92; *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986) (Arnold J., for a unanimous court, concurring).

In this case, the district court found, and the parties do not dispute, that Rule G and the medical examination policy, although not incorporated in the parties' written agreement, constitute implied-in-fact contractual terms. Thus, we reach the principal issue: whether Conrail's imposition of a drug screen was an interpretation of one or both of these agreements thereby constituting it as a minor dispute under 45 U.S.C. §153, First, (i), which it could institute unilaterally, or whether its attempt to impose such a drug screen was a new term constituting a major dispute under 45 U.S.C. §152, Seventh, over which it must bargain.

III.

Discussion

The Unions argue that the incorporation of a drug-screen test as an element of the urinalysis required in all periodic and return-to-duty physical examinations is a change in the existing rules and working conditions. They argue that the working conditions had not previously encompassed testing employees for drugs without some particularized suspicion or past medical problem and therefore the across-the-board testing is a major dispute within the jurisdiction of the district court. They also argue that the drug-screen represents a new method of enforcing Rule G, which had been enforced primarily by supervisory observation. Such a unilateral change in the method of enforcement, they contend, constitutes a major dispute.

Conrail responds that the addition of drug screening is arguably justified by the parties' long-standing implied-in-fact agreement authorizing Conrail to test the urine of employees to identify workers who are medically unfit for duty. It claims that the new screening is within its prerogative to modify its medical standards and procedures as a result of advances in medical science and medical technology. Conrail contends that because

there was no practice of requiring some medical evidence of drug usage prior to urinalysis as part of its routine medical examination, its new program which adds the drug-screen component to such urinalysis is not a significant departure from past practice.

A.

Three other courts of appeals have considered the same or similar drug-testing issues under the RLA, with varying results and rationales. In a pair of cases, the Ninth Circuit denominated as major disputes the use of drug-detecting dogs, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1102 (9th Cir. 1988) (*Dog Search Case*), and mandatory urinalysis testing of crewpeople implicated in "human-factor" accidents or operating-rule violations, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087 (9th Cir. 1988) (*Chemical Testing Case*), as a means of enforcing Rule G.

The majority's decision in the *Chemical Testing Case* was based chiefly on the "critical differences between the old method and the new method: the old method of enforcing Rule G was voluntary, and required particularized suspicion; the new method is mandatory, and requires only generalized suspicion." *Id.* at 1092. It noted that the enforcement method employed in the past — the supervisor's "observing an employee's gait, breath, odor, slurred speech, or bloodshot eyes — was non-intrusive." *Id.* It rejected the railroad's claim that the union, by acquiescing "in Rule G's enforcement by sensory surveillance can be said to have agreed to allow [the railroad] to implement *any* procedure beyond sensory surveillance so long as the procedure is brought into play by . . . an 'objective triggering event.' " *Id.* The court also noted that it had recently held that the Fourth Amendment was violated by Federal Railway Administration regulations which imposed a similar testing

program based only on generalized suspicion arising from an accident. *Id.* at 1093 (citing *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988)). The court ruled that it would construe the implied agreement with the railroad in enforcing Rule G as containing the same expectation of privacy as to the employer as the worker had as to the government. *Id.* at 1093. Because the new mandatory urine testing program changed the working conditions governed by the bargaining agreement, it was "by definition" a major dispute. *Id.*

In the *Dog Search Case*, involving the use of trained dogs to randomly search for drugs, the court again relied on the fact that previous practice under Rule G had always required "a triggering event", the perception of facts by an official suggesting that a specific employee was under the influence of alcohol or drugs. 838 F.2d at 1105. Furthermore, the court construed the parties' implied agreement as directed to whether an employee was under the influence of a prohibited substance, unlike the newly imposed search which was directed to detecting possession to prevent future use. *Id.*

Railway Labor Executives Association v. Norfolk & Western Railway Co., 833 F.2d 700 (7th Cir. 1987), presented the Seventh Circuit with issues almost identical to those we confront here. As here, the railroad added a drug screen to the urinalysis that had been a routine element of the medical examination. Rejecting the unions' argument that the drug-screening intruded into employees' conduct outside of the workplace, the court held that "[t]he addition of a drug screen as a second component of the urinalysis previously required of all employees does not constitute such a drastic change in the nature of the employees' routine medical examination or the parties' past practices that it cannot arguably be justified by reference to the parties' agreement." *Id.* at 706. The court of appeals rejected the unions' argument that the testing was designed to

enforce Rule G, holding that the district court's factual finding "that [the railroad] had not made any unilateral changes in the enforcement of Rule G" was not clearly erroneous. *Id.* at 707.

There were two separate testing issues before the Eighth Circuit in *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co.*, 802 F.2d 1016 (8th Cir. 1986). One, which is not at issue here, concerned the railroad's institution of post-incident testing to enforce Rule G. The court unanimously concluded that although the ground rules between the parties governing Rule G enforcement required suspicion of impairment to justify a test, the urinalysis " 'of the individual crew member having . . . exclusive responsibility for the action triggering the incident' " or other crew members "only when individual responsibility is not clear" satisfied that suspicion requirement and would not be "such a serious departure from past practice as to give rise to a major dispute." *Id.* at 1023 (quoting railroad policy).

The court divided on the second issue, the railroad's institution of a drug screen as part of its periodic and return-to-duty medical exams. Two members of the court tersely reversed the district court's finding that the medical examination screening presented a major dispute. The majority noted that the union did not deny that the agreement allowed medical testing to identify workers who were unfit for duty, and stated that consequently, "all that is involved in the parties' dispute is the extent to which the urinalysis component of these examinations may be refined in order to predict safe employee performance." *Id.* at 1024; *see also International Ass'n of Machinists, District Lodge 19 v. Southern Pacific Transp. Co.*, 105 LRRM 2046 (E.D. Cal. 1980) (use of alcohol breath test a minor dispute). Judge Arnold, in dissent, stressed that regardless of whether the testing was characterized as a medical or disciplinary matter, the medical testing program could result in

an employee's being fired without any prior suspicion of drug use. 802 F.2d at 1025 (Arnold, J., dissenting in part). "This new examination is universal and indiscriminate, in the sense that it is imposed without regard to any degree of suspicion that the employee is working while impaired." *Id.* at 1024. Such a change, he argued, was too significant to go forward without negotiations between the parties.

B.

The absence of any uniformity in interpretation by the other courts reinforces our responsibility to make an independent analysis of the applicable law to the undisputed facts. When a court holds that an existing agreement, explicit or implied, arguably justifies a new practice, the court has determined that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue. In this case, we must determine whether the existing agreement arguably admits of an implied term encompassing the new drug screening. *See Chemical Testing Case*, 838 F.2d at 1092-93; *cf. Transportation-Communication Employees Union v. Union Pacific R.R. Co.*, 385 U.S. 157, 160-61 (1966) ("In order to interpret [a collective bargaining] agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements.")

The district court held that the new testing was arguably within the terms of the existing medical examination agreement. We reach a contrary legal conclusion because the undisputed terms of the implied agreement governing medical examinations cannot be plausibly interpreted to justify the new testing program.

Under the stipulation agreed to by the parties, use of a drug screen was included as part of the urinalysis in

return-to-duty physical examinations "when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs." App. at 71. It was included as part of the periodic physical examination only in the latter situation, "when, in the judgment of the examining physician, the employee may have been using drugs." App. at 71-72.

Conrail argues that because it has been conducting drug-screen urinalysis from time to time since 1976, there is an arguable contractual basis for its imposition of drug screening as part of its routine medical examinations.[3] This argument overlooks what to us is the determinative distinction between the old and new practice: before, drug screening was included only when there was particularized cause and not as part of the routine urinalysis. The fact that the prior agreement encompassed drug screening only in instances where there was cause and limited the routinely administered urinalysis to tests for blood sugar and albumin persuades us to reject Conrail's argument that the medical testing agreement justifies testing without cause.

If we were to accept Conrail's argument that its prior medical testing justified the drug screen, it would expand the scope and effect of medical testing beyond that

---

3. In 1984, Conrail issued a new medical standards manual requiring a drug screen to be carried out in connection with all periodic examination urinalyses. The mandated testing was performed in only one of its four administrative regions, and was discontinued for budgetary reasons after six months. Conrail does not contend that this period of limited uniform testing without the apparent knowledge or agreement of the Unions worked a change in the parties' general agreement governing medical testing. *See generally* Baker v. United Transp. Union, 455 F.2d 149, 156 (3d Cir. 1971) (practice became part of parties' agreement where "the railroad has engaged in a certain activity over a sufficient period of time for the union to become aware of it and react accordingly if it objects").

of Rule G, the disciplinary rule aimed specifically at substance abuse. Under Rule G, only employees who are impaired while on the job or on call may be disciplined, whereas an employee whose drug use is detected through the new medical testing program may be fired even though s/he was never found to be impaired while at work or subject to duty.

Ultimately, Conrail's argument rests on the premise that testing urine for cannabis metabolites is no different in kind from testing urine for blood sugar. This ignores considerable differences in what is tested for and the consequences thereof. Employee drug testing is a controversial issue throughout the railroad industry and beyond. *See, e.g., Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (school bus attendants); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987) (Customs Service employees), *cert. granted*, 108 S. Ct. 1072 (1988); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) (race track jockeys), *cert. denied*, 107 S. Ct. 577 (1986); *Transport Workers' Union of Philadelphia v. Southeastern Pennsylvania Transp. Authority*, 678 F. Supp. 543 (E.D. Pa. 1988) (municipal transport workers); *Association of Western Pulp and Paper Workers v. Boise Cascade Corp.*, 644 F. Supp. 183 (D. Or. 1986) (paper mill workers); *Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 510, N.E.2d 325, 517 N.Y.S.2d 456 (1987) (school teachers). The practice poses serious ethical and practical dilemmas as well. *See, e.g., Substance Abuse in the Workplace: Readings in the Labor-Management Issues* (R. Hogler ed. 1987) [hereinafter *Substance Abuse*] (collecting commentary). We regard it as particularly significant that the General Counsel of the National Labor Relations Board has taken the position that drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the National Labor Relations

Act. *See* National Labor Relations Board, Office of the General Counsel Mem. GC 87-5 (Sept. 8, 1987), *reprinted in* Daily Labor Report (BNA), No. 184 at D-1 (Sept. 24, 1987) ("When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination.")

The function of bargaining over major disputes is obviously to reach agreement on terms and conditions which have not yet been addressed. Conrail cannot point to any existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed. *Cf. Shoemaker*, 795 F.2d at 1140, 1144; Rothstein, *Screening Workers for Drugs*, in *Substance Abuse, supra*, 115, 116-22. We search the past practices of the parties in vain for any indication of an agreement on these key matters. It follows that the agreement governing prior medical examinations cannot be strained to include, even arguably, an agreement to routinely perform a drug screen.

C.

The Unions also argue that the new testing is a change in working conditions in that it represents a change in the method of enforcing Rule G, which is itself a working condition. Conrail denies that its drug testing is designed to enforce Rule G, but argues that even if it were, the implementation of a new procedure to enforce Rule G would be a minor dispute. As we noted before, the only court of appeals to reach the issue of the characterization for RLA purposes of a change in the method of enforcement of Rule G ruled that it raised a major dispute. *See Chemical Testing Case*, 838 F.2d at 1092-93; *see also Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d at

1024-25 (Arnold, J., dissenting in part). However, in light of Conrail's disavowal of Rule G as a justification for the newly imposed drug screen and our conclusion that the existing medical policy did not arguably justify the drug screen, we need not reach the Rule G enforcement issue.

IV.

Conclusion

As we have explained above, Conrail's addition of drug screening to the urinalysis examination of employees as to whom Conrail has no particularized suspicion of drug use changes the terms and conditions governing the employment relationships. It therefore constitutes a major dispute which Conrail cannot impose unilaterally. Instead, the RLA requires that the parties must bargain under the prescribed procedure.

In so holding, we do not minimize the serious drug and alcohol problem in the transportation industry. *See, e.g.*, De Rosa, *Alcohol Problems in the Railroad Industry*, in *Substance Abuse, supra*, 29, 29 (reporting estimate that some 25 percent of railroad workers drink on duty or while subject to duty); *New Regulations to Control Substance Abuse in the Transportation Industry*, in *id.* at 31 (alcohol and drug abuse responsible for 37 deaths, 80 injuries and $34 million in property damage between 1975 and 1985). We also note that the Unions have stated in their brief that they "yield to no one in abhorence [sic] of alcohol or drug use in employment, or in the desire to purge the industry of their adverse effects." Appellants' Brief at 4. They will have an opportunity to effectuate this desire at the bargaining table.

The order of the district court dismissing the complaint for lack of subject matter jurisdiction will be reversed and the case remanded for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1289

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Appellants

vs.

CONSOLIDATED RAIL CORPORATION

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until June 1, 1988.

/s/ Dolores K. Sloviter
Circuit Judge

Dated: May 6, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*	:	
Appellants	:	
vs.	:	NO. 87-1289
CONSOLIDATED RAIL CORPORATION	:	

ORDER

The foregoing Motion to Extend Mandate until July 24 is denied. The Stay of Mandate will be extended until June 10, 1988.

By the Court,

/s/ Dolores K. Sloviter

Dated: June 6, 1988

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*	:	
Appellants	:	
VS.	:	
CONSOLIDATED RAIL CORPORATION	:	NO. 87-1289
Appellee.	:	

ORDER

The foregoing Motion is granted and the Stay of Mandate is extended until June 30, 1988.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: June 9, 1988

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*	:	CIVIL ACTION
VS.	:	FILED APRIL 28, 1987
CONSOLIDATED RAIL CORPORATION	:	NO. 86-2698

ORDER

AND NOW, this 27th day of April, 1987, upon consideration of the parties' cross-motions for summary judgment, it is hereby ORDERED that plaintiffs' complaint is DISMISSED for lack of subject matter jurisdiction. My decision is based on the following:

1. Plaintiffs Railway Labor Executives' Association, *et al.* seek to enjoin defendant Consolidated Rail Corporation (Conrail) from requiring employees represented by plaintiffs to undergo alcohol and drug testing. Plaintiffs claim Conrail's unilateral imposition of drug testing is contrary to the requirements of the Railway Labor Act, ("RLA") 45 U.S.C. §§151-188, and violates the Fourth Amendment of the United States Constitution.

2. Defendant argues that drug testing during return-to-work and periodic physical examinations involves a "minor dispute" under the RLA, and is subject to the mandatory and exclusive jurisdiction of the National Railroad Adjustment Board or a public law board. *See* 45 U.S.C. §153.

3. Plaintiffs, however, maintain that their claim is a "major dispute" subject to federal injunctive relief until the parties resolve the question in a collective bargaining agreement.

4. A major dispute arises when the contested conduct is not based on a collective bargaining agreement or on the long-standing practices or recognized customs of the parties. *See Elgin, Joliet & Eastern R.R. Co. v. Burley*, 325 U.S. 711, 723-24 (1945); *Brotherhood of Maintenance v. Burlington Northern R.R. Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986). *See also International Ass'n of Machinists v. Northwest Airlines*, 673 F.2d 700, 705-06 (3d Cir. 1982).

5. A minor dispute relates to the meaning or proper application of a particular provision of an existing agreement or long-standing practice. *See Brotherhood of Maintenance*, 802 F.2d at 1022.

6. A dispute is minor if the parties' agreement is reasonably susceptible of the contested interpretation or if the employer's action is arguably justified under the terms of the existing agreement. *Id.* Thus, the employer bears a "relatively light" burden of showing that its action is a minor change. *Id.*

7. Since its inception in 1976, Conrail has required all hourly employers to undergo periodic and return-to-duty physical examinations. These physicals have included urinalysis, but not a drug screen. *See* Stipulation ¶ 5, 6.

8. Under some circumstances, involving suspected drug use or prior drug problems however, Conrail has included a drug screen as part of a physical examination urinalysis. *See id.* ¶ 7.

9. Since February, 1987, Conrail has included a drug screen as part of all periodic and return-to-work physicals.

10. Therefore, Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy. The

union and Conrail always have shared a concern over drug and alcohol abuse, *see* Rule G, Stipulation ¶ 1, and since 1976 they have acquiesced in certain procedures to ensure an employee's fitness for the job. The parties always have recognized Conrail's right to remove from service employees who are unable to perform their duties safely. Conrail's drug testing program is a further refinement of that practice and is consistent with its right to ensure the safety of its operations.

11. Under these circumstances, Conrail's action constitutes a minor dispute, and for the reasons set forth in *Brotherhood of Maintenance*, 802 F.2d 1016; *Railway Labor Executives' Ass'n, et al. v. Southern Ry. Co.*, C.A. No. C86-1570 (N.D. Ga., Mar. 4, 1987); *Railway Labor Executives' Ass'n, et al. v. Norfolk & Western Ry. Co.*, C.A. No. 86-C-2064 (N.D. Ill., Feb. 2, 1987), I dismiss Counts I and II for lack of subject matter jurisdiction.

12. Although I could grant an injunction even in a minor dispute, this authority must be exercised only in rare cases where it is necessary to keep the controversy from growing into a major dispute. *See Brotherhood of Maintenance*, 802 F.2d at 1021-22. Plaintiffs have failed to show for purposes of this motion that this is a case calling for such exceptional relief.

13. Finally, I dismiss Count III (alleging a Fourth Amendment violation) because plaintiffs have failed to show for purposes of this motion that Conrail is a federal actor whose actions are subject to constitutional scrutiny. They claim that Conrail is a governmental enterprise because it was created by Congress and it relies heavily on federal funds. These arguments have been uniformly rejected by federal courts and I concur in their analysis. *See*,

e.g., Morin v. Consolidated Rail Corporation, 810 F.2d 720, 722-23 (7th Cir. 1987); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54-55 (2d Cir. 1985); *Anderson v. National Railroad Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984); *Wenzer v. Consolidated Rail Corp.*, 464 F. Supp. 643, 647-49 (E.D. Pa.), *aff'd*, 612 F.2d 576 (3d Cir. 1979). Indeed, the Supreme Court has observed that despite federal involvement on the board of directors, Conrail is basically a private enterprise. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974).

/s/ A. Scirica
Anthony J. Scirica, J.
April 28, 1987

STATUTORY PROVISIONS OF THE RAILWAY LABOR ACT

§152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such places of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 bidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provision of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with

the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper

court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation

fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than

that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after

such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section

shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers

and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however*, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil

suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board; *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court

shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the

compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however*, That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority

conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional

boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be

compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and b.nding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

§156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

COMMONWEALTH OF :
PENNSYLVANIA :
: ss.
COUNTY OF PHILADELPHIA :

AFFIDAVIT

I, F. J. Ilsemann, Jr., being duly sworn according to law, depose and say as follows:

1. I am employed by Consolidated Rail Corporation (hereinafter "Conrail") as Director of Health Services. In that capacity, I have overall responsibility for formulating medical standards applicable to Conrail employees and supervising the implementation of medical policies and procedures consistent with these medical standards. These medical standards include those applicable to the periodic, return-to-duty and follow-up physical examinations required of Conrail employees.

2. As a result of advances in medical science and medical technology, Conrail has periodically revised its medical standards. For example, for many years Conrail relied upon an examining physician's voice to conduct employee hearing tests. Conrail modified its procedures, however, to provide for the use of audiometers to conduct such tests. Similarly, Conrail now conducts spirometric examinations, measuring lung capacity, using computers rather than the calibrated bellows used in the past. Conrail has also revised its methods of conducting electrocardiograms and visual examinations based on advances in medical technology. These modifications have been made unilaterally without any consultation with Conrail's unions.

3. Conrail requires its employees to undergo several types of medical examinations including

periodic physicals, return-to-duty physicals and return-to-duty follow-up examinations. These examinations have been routinely conducted since at least the time of Conrail's inception in 1976. Descriptions of these examinations and the employees to whom they apply are set forth in Conrail's Medical Standards Manual. Relevant portions of the Medical Standards Manual are attached hereto as Attachment A.

4. Conrail requires employees to undergo periodic physical examinations every three years up to and including age fifty and every two years thereafter, with some exceptions as set forth in Attachment A. All periodic physical examinations have routinely included a urinalysis for blood sugar and albumin. A drug screen was also included as part of the periodic physical urinalysis when, in the judgment of the examining physician, the employee may have been using drugs. On April 1, 1984, Conrail issued a Medical Standards Manual, attached hereto as Attachment A, which provided that a drug screen would be included as part of all periodic physical urinalyses. For budgetary reasons, this policy was only applied in one of Conrail's regions, the Eastern Region, for a six month period and was then discontinued (Conrail's rail operations are divided into four regions: the Eastern Region, headquartered in Philadelphia; the Western Region, headquartered in Detroit; the Northeastern Region, headquartered in Selkirk, New York; and the Central Region, headquartered in Pittsburgh). Conrail then returned to its original policy of including drug screens as part of the periodic physical urinalysis only when, in the physician's judgment, the employee may have been using drugs. On February 20, 1987, however, Conrail announced that drug screens would be included as part of all periodic physical urinalyses.

5. With respect to return-to-duty physical examinations, such examinations have been required of all train and engine employees who have been out of service for at least thirty days due to furlough, leave, suspension, or similar causes. Other employees who have been out of service for at least ninety days are also required to undergo physical examinations upon returning to duty. These examinations have routinely included a urinalysis for blood sugar and albumin. In addition, a drug screen was originally included as part of the urinalysis when the employee had been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. When Conrail issued its Medical Standards Manual on April 1, 1984, the manual provided that drug screens would be included as part of all return-to-duty urinalyses. As with periodic physical examinations, this policy was only applied to Conrail's Eastern Region for a six-month period. Conrail thereafter returned to its original policy of requiring a drug screen only when the employee had been previously taken out of service for a drug-related problem, or when, in the judgment of the physician, the employee may have been using drugs. On February 20, 1987, however, Conrail also announced that a drug screen would be included as part of all return-to-duty urinalyses.

6. With respect to return-to-duty follow-up examinations, also known as periodic-special examinations, Conrail's Department of Health Services has been responsible for determining whether an employee's condition justified requiring follow-up examinations to evaluate the employee's continuing fitness to work after he or she has returned to duty. Such follow-up examinations have, for example, been required of employees who have suffered heart

attacks, or have been diagnosed as having hypertension or epilepsy. On February 20, 1987, Conrail announced that its follow-up examination policy would also apply to employees who return to duty from being disqualified for any reason associated with drug use.

7. Since at least the time of its inception in 1976, Conrail has required that any employee who undergoes a periodic, return-to-duty or follow-up physical examination and who fails to meet Conrail's established medical standards may be held out of service without pay until the condition is corrected or eliminated. Thus, for example, employees have been held out of service until their vision can be corrected or their blood pressure reduced to meet medical standards. Employees have also been held out of service if their blood sugar, as revealed by urinalysis, is too high. Employees who fail to meet Conrail's medical standards by testing positive for illegal drugs will not be returned to service unless they can provide a negative drug test within forty-five days from a medical facility to which the employee is referred by Conrail's Medical Director. This forty-five day period begins on the date of the letter notifying the employee that he or she is being withheld from service. An employee whose first test is positive is given the opportunity for an evaluation by Conrail's Employee Counseling Service. If the evaluation reveals an addiction problem and the employee agrees to enter an approved treatment program, the employee will be given an extended period of 125 days to provide a negative drug test.

8. Conrail also requires job applicants to submit to a drug screen as part of the urinalysis which is required of all applicants during pre-employment physicals. These drug screens are also part of the

physical examinations required of Conrail's executives. Conrail does not, however, conduct "reasonable suspicion" testing of its employees as authorized by the Federal Railroad Administration's regulations entitled "Control of Alcohol and Drug Use in Railroad Operations."

9. The foregoing facts are true and correct and based upon my personal knowledge, and knowledge obtained by me in the course of the performance of my duties as Director of Health Services.

/s/ F. J. Ilsemann, Jr.
F. J. Ilsemann, Jr.

Sworn to me and subscribed
before me this 6th day of
March, 1987.

/s/ Alfonso J. DiGregorio
Notary Public

ALFONSO J. DiGREGORIO
Notary Public, Philadelphia,
Philadelphia Co.
My Commission Expires
September 24, 1988

IV. DESCRIPTION OF MEDICAL EXAMINATIONS

PRE-EMPLOYMENT

Who:	All job applicants
Content:	Full medical history
	Complete physical examination including funduscopic, blood pressure, pulse, temperature, height and weight
	Routine urinalysis, including a screen for the use of controlled substances
	Visual examination for near and distant vision, uncorrected and corrected
	Color vision evaluation
	Hearing examination, including baseline audiogram
	Spirometry
	Base line EKG for all Class A applicants
Frequency:	At the time of employment
Forms used:	MD-40 and MD-1

PERIODIC-REGULAR

Who:	All employees as listed in frequency schedule below
Content:	Full medical history
	Complete physical examination including funduscopic, blood pressure, pulse, temperature, height and weight
	Routine urinalysis, including a screen for the use of controlled substances

Visual examination for near and distant vision, uncorrected and corrected

Color vision evaluation

Hearing examination if employee is subject to the Hearing Conservation Program

Spirometry

EKG required only on Locomotive Engineers, Hostlers or Firemen

Frequency: Positions listed below require periodic examinations every three years up to and including age 50 and every two years thereafter, with exceptions noted:

Train and Engine Service Employees (Locomotive Engineer, Fireman, Hostler, Conductor, Brakeman, Flagman, Switchtender) Exception: State of New Jersey requires annual periodic examination of Locomotive Engineers

Road Foreman of Engines

Trainmaster

Block Operator, Towerman, Leverman

Crane or Derrick Operator, Machine Operator (Class 1 and 2)

Operator of Over-the-Highway Vehicles Exception: Operator of Over-the-Highway Vehicles require periodic examination every two years

Police Officer

Inspection and Repair Foreman

Employee engaged in preparation/serving food. Exception: must be examined annually

Train Dispatcher

Any non-agreement employee who works around heavy moving equipment Exception: Division Superintendents must be examined annually

Supervisory positions in Systems Operations Bureau Exception: Must be examined annually

Forms used: MD-40 and MD-2D

PERIODIC-SPECIAL

Who: In-service employees requiring re-evaluation of an existing condition as initiated by examining physician.

Content: Medical re-evaluation of pre-existing condition after appropriate interval set by examining physician at initial examination.

Frequency: As established by examining physician (e.g. 1 month, 3 months, etc.)

Forms used: MD-40 and MD-2D or MD-2C.

RETURN FROM FURLOUGH, LEAVE, SUSPENSION OR SIMILAR CAUSES

Who: Employees who are returning to service after an absence for other than disability reasons.

Content: Full medical history

Complete physical examination, including funduscopic blood pressure, pulse, temperature, height and weight

Routine urinalysis, including a screen for the use of controlled substances

Visual examination for near and distant vision, uncorrected and corrected

	Color vision evaluation
	Hearing examination if employee is subject to the Hearing Conservation Program
	Spirometry
	EKG, required only on Locomotive Engineers, Hostlers or Firemen.
Frequency:	Required of Train and Engine Service employees after 30 days absence
	Required of all employees, other than Train and Engine Service, absent more than 90 days
Forms used:	MD-40 and MD-2D or MD-2C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*, *Plaintiffs*,	)	
v.	)	Civil Action NO. 86-2698
CONSOLIDATED RAIL CORPORATION, *Defendant*.	)	

STIPULATION

In the interest of obviating the need for extensive discovery, counsel for Plaintiff Unions and counsel for Defendant Consolidated Rail Corporation (hereinafter "Conrail") hereby agree to the following facts:

1. Since at least the time of Conrail's inception in 1976, Conrail employees, both those covered by the Hours of Service Act, 45 U.S.C. §§61-64d (hereinafter "the Act"), and those not covered by the Act, have been subject to the provisions of Rule G or rules that are identical in substance to Rule G. Rule G provides:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited. Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties.

2. Conrail has relied upon two methods of enforcing Rule G: 1) supervisory observation; and 2)

encouraging employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine or other diagnostic tests.

3. In August, 1985, the Federal Railroad Administration of the United States Department of Transportation promulgated regulations at 49 C.F.R. §219 *et seq.*, mandating post accident toxicological testing for railroad employees covered by the Hours of Service Act. These regulations became effective on February 10, 1986.

4. Since March 10, 1986, Conrail has required all employees covered by the Hours of Service Act to undergo post-accident toxicological testing as required by the regulations promulgated by the Federal Railroad Administration. Employees who are not covered by the Act are not required to undergo post-accident toxicological testing.

5. Since at least the time of its inception in 1976, Conrail has required all hourly employees, both those covered by the Hours of Service Act and those not covered by the Act, to undergo periodic physical examinations. These periodic examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

6. Since at least the time of its inception in 1976, Conrail has required all train and engine employees who have been out of service for at least thirty days due to furlough, leave, suspension or similar causes to undergo physical examinations upon returning to duty. In addition, since at least the time of its inception in 1976, Conrail has also required all other employees who have been out of service for at least ninety days due to furlough,

leave, suspension or similar causes to undergo physical examinations upon returning to duty. Return-to-duty physical examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

7. Since at least the time of its inception in 1976, Conrail has included a drug screen as part of the return-to-duty and periodic physical examination urinalyses of certain employees. With respect to return-to-duty physical examinations, a drug screen has been included as part of the urinalysis when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. With respect to periodic physical examinations, a drug screen has been included as part of the urinalysis when, in the judgment of the examining physician, the employee may have been using drugs.

Respectfully submitted,

Of Counsel:

MORGAN, LEWIS & BOCKIUS

/s/ Joseph J. Costello
DENNIS J. MORIKAWA
JOSEPH J. COSTELLO
2000 One Logan Square
Philadelphia, PA 19103

HERMON M. WELLS
CONSOLIDATED RAIL CORPORATION
6 Penn Center Plaza
Philadelphia, PA 19104

Attorneys for Defendant
Consolidated Rail Corporation

/s/ Lawrence M. Mann
LAWRENCE M. MANN
DEBORAH E. REISER
Suite 811
400 First Street, N.W.
Washington, D.C. 20001

Of Counsel:

ALPER, MANN & REISER

CORNELIUS O'BRIEN
1500 Market Street
Philadelphia, PA 19102

Attorneys for Plaintiff
Unions

Approved and So Ordered this 11th day of February, 1987.

/s/ A. Scirica
U.S.D.C.J.

(2)

No. 88-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et. al.*,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

LAWRENCE M. MANN
Alper & Mann
Suite 811
400 First Street, N.W.
Washington, D. C. 20001
(202) 298-9191

CORNELIUS C. O'BRIEN, JR.
Cornelius C. O'Brien, Jr., P.C.
1760 Market Street,
Seventh Floor
Philadelphia, PA 19103
(215) 568-4343

Attorneys for Respondents
Railway Labor Executives'
Association

TABLE OF CONTENTS

QUESTION PRESENTED

Whether the unilateral imposition of alcohol and drug testing by the Consolidated Rail Corporation against all crafts of railroad workers constitutes a "major" or "minor" dispute under the Railway Labor Act, where the railroad has a long established practice of requiring reasonable or particularized suspicion for detection and enforcement of the rule against alcohol or drug impairment.

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1

CONSOLIDATED RAIL CORPORATION,

Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et. al.*,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

A. COUNTER-STATEMENT OF THE CASE

Prior to February 20, 1987, the Petitioner, Consolidated Rail Corporation (hereinafter "Conrail" or "the railroad"), had performed drug screening of employees under only limited circumstances. As the parties stipulated in the district court, Conrail, since its inception in 1976, has included a drug screen as part of the return to duty and periodic physical examination urinalyses of only certain employees. Drug screening was performed *only* when the returning employee had been taken out of service for a drug related problem, or, with respect to periodic examinations, when the examining physician had reason to believe that the employee may have been using drugs. (Resp. App. A-3).

In addition, all Conrail employees had been governed by the requirements of Rule G. Rule G provides:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> Employees under medication before or while on duty must make certain that such use will not affect the safe performance of their duties.

(Resp. App. A-1).

In enforcing this rule Conrail has always relied upon the supervisory observation of its employees; and, in the event that an employee was suspected of drug or alcohol abuse, that employee was required to submit to testing.

On July 29, 1985, the Federal Railroad Administration (hereinafter "FRA") promulgated 49 C.F.R. § 219 *et seq.*, which is entitled Control of Alcohol and Drug Use. This rule, which went into effect on February 10, 1986, requires toxicological testing of employees covered by the Hours of Service Act whenever specified train accidents or incidents occur, and authorizes testing based on reasonable suspicion for specific rule violations.[1] Since March 10, 1986, Conrail has required that all of its employees covered by the Hours of Service Act comply with the FRA's regulations.

On February 20, 1987, Conrail unilaterally decided to add drug screening to the urinalysis examination of all employees, including those as to whom Conrail has no particularized suspicion of drug use. The Respondents, Railway

[1] On June 6, 1988, the Court granted the Government's Petition for Writ of Certiorari to determine the constitutionality of the FRA's testing regulation. *Burnley* v. *Railway Labor Executives' Association*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S.Ct. 2033 (1988).

Labor Executives' Association (hereinafter "RLEA"), contend that this testing imposed by Conrail beyond that established by the FRA (49 C.F.R. § 219 *et seq.*) is a unilateral change in the rules and working conditions of the railroad, and, as such, constitutes a major dispute within § 152, Seventh, of the Railway Labor Act (hereinafter "RLA") (45 U.S.C. § 152, Seventh). The Petitioner claims that the testing creates a "minor" dispute under the RLA and is thus subject to the exclusive jurisdiction of the National Railroad Adjustment Board or other public law board. *See* 45 U.S.C. § 153.

Safety rules in the railroad industry are a critical element of working conditions and are thus subject to the provisions of § 2, Seventh, of the RLA (45 U.S.C. § 152, Seventh), which prohibit a carrier from making any unilateral change in working conditions except in the manner prescribed in the labor agreement or in § 6 of the RLA (45 U.S.C. § 156).

The Petitioner seeks to justify its unilateral imposition of drug screen tests as simply a refinement in its medical procedures, unrelated to the enforcement of Rule G, to reflect scientific advancement in the scope of urine testing. Initially, it is to be noted that Petitioner instituted the requirement for a drug screen urinalysis in the return-to-work and periodic physicals in February 1987, long after drug screen urinalysis was established as an accepted procedure. Inconsistently, Petitioner contends that the requirement for a drug screen urinalysis as part of the routine comprehensive physical examination was a long-standing requirement. (Pet. Br. 2-3, 8-9). This is misleading, because it fails to point out that the drug screen urinalysis was not a policy utilized until February 1987, at the earliest.

Furthermore, drug screening urinalysis tests are not just a refinement of existing medical procedure. Rather, the

implications of these tests, and the invasion of the employees' privacy which they entail, places them outside the purview of the routine medical examinations.

Petitioner's contention that the inclusion of urinalysis drug testing as an element in all physical examinations (including examinations upon return to work from furlough, leave or suspicion) is not an enforcement or surveillance procedure for Rule G is contradicted by the testimony of its representatives in the FRA rule-making proceedings. (Resp. App. A-5).

It is clear from these hearings that the Conrail witnesses felt the railroad needed authority to test. Mr. Herman Wells, Conrail's legal representative at the hearings, in response to questioning concerning the use of testing devices stated:

> "Mr. Wells: What we intended to convey was that we would like to have authority to use those breathalyzers to test when we thought there was a reason to test or maybe even occasionally for spot checks."

(Resp. App. A-7).

The industry testimony in the rule-making proceedings establishes beyond challenge that toxicological testing was viewed as a method for enforcement or surveillance of Rule G. This is clear from the testimony of Mr. A. William Johnston, Vice President, Operations and Maintenance Department, Association of American Railroads:

> Importantly, it is essential that the breath urinalysis and similar tests to be used and viewed as merely supplemental to existing methods of enforcing Rule G.

(Resp. App. A-13).

Although these referenced comments were made in the context of the breathalyzer tests, which was one of the several toxicological tests considered in the rule-making proceedings, they are pertinent to an understanding that the urinalysis drug screen represents a method for the enforcement and surveillance of Rule G. That these drug screening policies serve to enforce Rule G is further evidenced by the expansion of the policy to include FRA probable cause testing.

The combined effect of these changes constitutes a major change in working conditions and the rules relating thereto. It is clear we are not concerned here with an *interpretation* of the existing labor agreements and the established procedure thereunder but with a *change* in the established practice.

B. DECISIONS OF THE COURTS BELOW

Upon consideration of the parties' cross-motions for summary judgment, the United States District Court for the Eastern District of Pennsylvania dismissed this case, brought by the RLEA, for lack of subject matter jurisdiction. The court held that the drug screen testing was a minor dispute under the RLA.

On appeal, the U. S. Court of Appeals for the Third Circuit reversed the District Court decision and remanded the case for further proceedings. In relating the history of the RLA, the court, Sloviter, J., noted that "minor" disputes were to be limited to "comparatively minor" problems, "representing specific maladjustments of a detailed or individual quality," 845 F.2d 1187, 1190 (3d Cir. 1988) (*quoting Elgin, Joliet & Eastern Railway* v. *Burley*, 325 U.S. 711, 724 (1945)). The court concluded that Conrail's addition of drug screening to the urinalysis examinations of all employees "changes the terms and conditions governing the employment relationships" and therefore "constitutes a

major dispute which Conrail cannot impose unilaterally." *Id.* at 1194.[2]

C. REASONS FOR DENYING THE WRIT

This litigation does not involve any novel points of law that the Court has not already addressed. It arises under the RLA, 45 U.S.C. § 151 *et seq.* The specific issue is whether the actions of the Petitioner in implementing its drug testing policy constitute either a "major" or "minor" dispute under the RLA. This Court long ago set out the criteria for determining when a dispute is either "major" or "minor." *See Elgin, Joliet & Eastern Railway* v. *Burley,* 325 U.S. 711 (1945). *Detroit & Toledo Shore Line Railroad* v. *United Transportation Union,* 396 U.S. 142 (1969). The legal standards to be followed are well known and the Third Circuit Opinion correctly discusses such legal standards. (Pet. App. A-6 - A-10). In reaching its decision, the Third Circuit acknowledged that three other courts of appeal have considered the same or similar drug-testing issues under the RLA, with varying results and rationales. (Pet. App. A-11). However, these cases can be distinguished based upon the specific facts of each case. (*see* Pet. App. A-11 - A-14). The Court during the last term denied a Petition for Certiorari in one of those cases whose issues were somewhat similar to the present case. *Chicago & NorthWestern Transportation Co.* v. *Brotherhood of Maintenance of Way Employees,* 827 F.2d 330 (8th Cir. 1987), *cert. denied,* 108 S.Ct. 1291 (1988). So long as the lower courts apply the correct legal principle, it doesn't seem to be an appropriate function of this Court to review and reconcile the factual distinctions.

In any event, the Third Circuit decision is correct. For the Petitioner to argue that this case is a "minor" dispute

[2] The Third Circuit stayed its decision pending this Petition for a Writ of Certiorari.

defies reasonable logic. This case would reach constitutional proportions but for the fact that the testing is not mandated by a public agency. *See Burnley* v. *Railway Labor Executives' Association,* 839 F.2d 575 (9th Cir.), *cert. granted,* 108 S.Ct. 2033 (1988).

The U. S. Department of Transportation recognizes that railroads cannot unilaterally impose toxicological testing requirements on employees. This is clearly established in its comments in the rule-making proceedings relating to the promulgation of the Rules on Control of Alcohol and Drug Use for employees covered under the Hours of Service Act:

> Although the railroads clearly desire to prevent alcohol and drug-related accidents and have obvious incentives to do so, the policy of the Railway Labor Act, as construed in arbitration and in courts, severely limits the ability of management to implement new techniques to control the problem. FRA has previously described Award No. 23334 of the First Division, National Railroad Adjustment Board (June 25, 1982), which blocked the attempt of a western railroad to institute random breath testing of employees by use of a portable device. The Board ruled that compulsory testing was not authorized by existing collective bargaining agreements and that requiring employees to submit to such testing was inconsistent with longstanding custom and practice under those agreements. The breadth of the language used in the award suggests that other, more limited programs of testing would also be deemed to offend the status quo policy of the Railway Labor Act, if implemented by unilateral action of management.

50 Fed. Reg. 31,528 (1985).

Furthermore, the General Counsel of the National Labor Relations Board has concluded that the "implementation of a drug testing program is a substantial change in working conditions, ..." Memorandum GC 87-5, *Daily Lab. Rep.* (BNA), D-1 (Sept. 24, 1987). The Memorandum states that drug testing is a mandatory subject of bargaining under the National Labor Relations Act ("NRLA").

The General Counsel's reasoning is that there is a substantial change in working conditions inherent in drug testing as compared with traditional physicals examinations. As stated in the Memorandum:

> . . . the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination. Generally, a physical examination is designed to test physical fitness to perform the work a drug test is designed to determine whether an employee or applicant uses drugs, irrespective of whether such usage interferes with ability to perform work. In addition, it is our view that a drug test is not simply a work rule—rather, it is a means of policing and enforcing compliance with a rule. There is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is being broke. Moreover, a drug test is intrinsically different from other means of enforcing legitimate work rules in the degree to which it may be found to intrude into the privacy of the employee being tested or raise questions of test procedures, confidentiality, laboratory integrity, etc. The implementation of such a test, therefore, is 'a material, substantial, and . . . significant change in [an employer's] rules and practices . . . which vitally affect[s] employee tenure and conditions of employment generally.'

The standard for the requirement of collective bargaining following substantial changes in working conditions is an element of both the NLRA and the RLA. Accordingly, the railroad's argument relative to the implementation of drug testing flies directly in the fact of the established and accepted principles governing such tests.

The Court has a similar Petition for Certiorari pending in *Burlington Northern Railroad* v. *Brotherhood of Locomotive Engineers*, 838 F.2d 1087 (9th Cir. 1988) *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631). The facts in that case and the present one are related but are not exactly the same (*see* Pet. App. A-11 - A-12). However, the ultimate issue of whether each railroad unilaterally changed the working conditions and thus did not comply with the Railway Labor Act is the same. In view of the similarities in the two pending cases, the Court may wish to defer action here until it determines whether to grant certiorari in the *Burlington Northern Railroad* case.

Finally, the appropriate forum for Petitioner should be Congress, not this Court to redress its rights (or lack thereof) under the RLA. Congress is actively considering legislation which would clarify the rights and obligations of railroads in conducting toxicological testing. *See* H.R. 4748, 100th Cong., 2d Sess. (1988); H.R. 3051, 100th Cong., 1st Sess. (1987); S. 1041, 100th Cong., 1st Sess. (1987).[3] It would save everyone time and effort to await anticipated

---

[3] The latter two bills concern random testing in the railroad industry, but H.R. 4748 covers all types of testing, including the tests being performed by the Petitioner.

Congressional action on this issue. The legislation will likely make the pending litigation moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

LAWRENCE M. MANN
Alper & Mann
Suite 811
400 First Street, N.W.
Washington, D.C. 20001

CORNELIUS C. O'BRIEN, JR.
Cornelius C. O'Brien, Jr., P.C.
1760 Market Street
Seventh Floor
Philadelphia, PA 19103
Attorneys for Respondents

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL., *Plaintiffs,* v. CONSOLIDATED RAIL CORPORATION, *Defendant.*	CIVIL ACTION NO. 86-2698

STIPULATION

In the interest of obviating the need for extensive discovery, counsel for Plaintiff Unions and counsel for Defendant Consolidated Rail Corporation (hereinafter "Conrail") hereby agree to the following facts:

1. Since at least the time of Conrail's inception in 1976, Conrail employees, both those covered by the Hours of Service Act, 45 U.S.C. §§61-64d (hereinafter "the Act"), and those not covered by the Act, have been subject to the provisions of Rule G or rules that are identical in substance to Rule G. Rule G provides:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties.

2. Conrail has relied upon two methods of enforcing Rule G: 1) supervisory observation; and 2) encouraging employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine or other diagnostic tests.

3. In August, 1985, the Federal Railroad Administration of the United States Department of Transportation promulgated regulations at 49 C.F.R. §219 *et seq.*, mandating post accident toxicological testing for railroad employees covered by the Hours of Service Act. These regulations became effective on February 10, 1986.

4. Since March 10, 1986, Conrail has required all employees covered by the Hours of Service Act to undergo post-accident toxicological testing as required by the regulations promulgated by the Federal Railroad Administration. Employees who are not covered by the Act are not required to undergo post-accident toxicological testing.

5. Since at least the time of its inception in 1976, Conrail has required all hourly employees, both those covered by the Hours of Service Act and those not covered by the Act, to undergo periodic physical examinations. These periodic examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

6. Since at least the time of its inception in 1976, Conrail has required all train and engine employees who have been out of service for at least thirty days due to furlough, leave, suspension or similar causes to undergo physical examinations upon returning to duty. In addition, since at least the time of its inception in 1976, Conrail has also required all other employees who have been out of service for at least ninety days due to furlough, leave, suspension or similar causes to undergo physical examinations

upon returning to duty. Return-to-duty physical examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

7. Since at least the time of its inception in 1976, Conrail has included a drug screen as part of the return-to-duty and periodic physical examination urinalyses of certain employees. With respect to return-to-duty physical examinations, a drug screen has been included as part of the urinalysis when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. With respect to periodic physical examinations, a drug screen has been included as part of the urinalysis when, in the judgment of the examining physician, the employee may have been using drugs.

Respectfully submitted,

/s/ Joseph J. Costello

Of Counsel:

MORGAN, LEWIS & BOCKIUS

DENNIS J. MORIKAWA
JOSEPH J. COSTELLO
2000 One Logan Square
Philadelphia, PA 19103

HERMON M. WELLS
CONSOLIDATED RAIL CORPORATION
6 Penn Center Plaza
Philadelphia, PA 19104

Attorneys for Defendant
Consolidated Rail Corporation

/s/ Lawrence M. Mann

LAWRENCE M. MANN
DEBORAH E. REISER
Suite 811
400 First Street, N.W.
Washington, D.C. 20001

CORNELIUS O'BRIEN
1500 Market Street
Philadelphia, PA 19102

Attorneys for Plaintiff
Unions

Of Counsel:

ALPER, MANN &
REISER

Approved and So Ordered this day of , 1987.

U.S.D.C.J.

DEPARTMENT OF TRANSPORTATION

FEDERAL RAILROAD ADMINISTRATION

IN RE:

CONTROL OF ALCOHOL AND DRUG USE IN RAILROAD OPERATION ADVANCE NOTICE OF PROPOSED RULEMAKING

Docket No. RSOR-6

The above entitled matter came on for hearing on September 1 and 2, 1983, at the Department of Transportation, 7th & C Streets, S.W., Room 2230, Washington, D.C.

BEFORE PANEL MEMBER:

THOMAS A. TILL, Chairman, Deputy Administrator
JOHN M. MASON, Chief Counsel
JOSEPH W. WALSH, Associate Administrator for Safety
WALTER ROCKEY, Special Assistant to Associate Administrator to Safety
GRADY C. COTHEN, Esquire

be doing later on when he's in a much larger and more dangerous vehicle, in other words he has a great deal more responsibility for the public at one time.

MR. TILL: Are there any questions from the audience? If not, thank you very much for your testimony and your appearance here today and for the information that you provided.

MS. NATHANSON: Thank you.

MR. TILL: The next witness is Mr. Don Swanson, the Vice President of Operations of Consolidated Rail Corporation, accompanied by a panel.

MR. SWANSON: Thank you, Mr. Chairman, members of the panel. I'm Donald Swanson, Vice President — Transportation of the Consolidated Rail Corporation.

Accompanying me are Mr. Herman Wells, our legal representative and John Gorman, our Manager of Employee Assistance.

On behalf of Conrail, I want to express appreciation for this opportunity to contribute information and views for

resolving the problem of alcohol and drug use in the railroad industry.

My own department has a major part of the responsibility for promoting safety by working.

MR. MASON: You mean mandatory by FRA?

MR. WELLS: What we intended to convey was that we would like to have authority to use those breathalyzers to test when we thought there was a reason to test or maybe even occasionally for spot checks. But we would not like a requirement by the FRA that we should use them in all cases.

MR. MASON: In principle then, you do not think that occasional random use of the breath testing device — assuming the proper safeguards — is in and of itself warranted — — —

MR. WELLS: No, it would be useful deterrent.

MR. MASON: But to clear that up, do you believe that at some point unregulated, overzealous use of a testing device on a random basis could reach a level of operation that would be inappropriate?

MR. WELLS: It might.

MR. MASON: Thank you, that's all I have.

MR. TILL: Are there any further questions from the audience? Mr. Cothen?

MR. COTHEN: Does Conrail require any annual physicals?

MR. SWANSON: Yes, it does.

MR. COTHEN: Are they performed by private physicians?

MR. SWANSON: In some cases — well, they're performed in some cases by private physicians under contract with Conrail.

MR. COTHEN: Are the physicians asked to do a drug screen of —

MR. SWANSON: No, they are not.

MR. COTHEN: Have you considered it?

MR. SWANSON: Not that I'm aware of.

MR. COTHEN: Would it present any — obstacles?

MR. SWANSON: Not to my knowledge, no.

MR. TILL: Thank you, Mr. Swanson. The next witness is Mr. William Johnston of the Association of American Railroads, accompanied by Mr. Hollis Duensing.

MR. DUENSING: Mr. Till, I apologize for not having extra statements of Mr. Johnston here with us today.

As you know, we were scheduled to appear tomorrow and in view of previous comments that you — indicating that you'd like to hear us today, we must proceed on the basis of our draft statement. And I have an extra copy which I can either give to the panel or to the reporter, whichever you wish.

DEPARTMENT OF TRANSPORTATION

FEDERAL RAILROAD ADMINISTRATION

IN RE:

CONTROL OF ALCOHOL AND DRUG USE

IN RAILROAD OPERATION

ADVANCE NOTICE OF PROPOSED RULEMAKING

Docket No. RSOR-6

The above entitled matter came on for hearing on September 1 and 2, 1983, at the Department of Transportation, 7th & C Streets, S.W., Room 2230, Washington, D.C.

BEFORE PANEL MEMBER:

THOMAS A. TILL, Chairman, Deputy Administrator
JOHN M. MASON, Chief Counsel
JOSEPH W. WALSH, Associate Administrator for Safety
WALTER ROCKEY, Special Assistant to Associate Administrator to Safety
GRADY C. COTHEN, Esquire

BEFORE THE

UNITED STATES

DEPARTMENT OF TRANSPORTATION

FEDERAL RAILROAD ADMINISTRATION

CONTROL OF ALCOHOL AND DRUG ABUSE IN RAILROAD OPERATIONS
FRA DOCKET NO. RSOR-6, NOTICE NO. 1

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

My name is A. William Johnston, Vice President, Operations and Maintenance Department, Association of American Railroads.

The nation's railroads are committed to the strong and effective enforcement of the existing prohibitions against the use of alcohol and drugs and the possibility of employees performing duties when under the influence of alcohol or drugs. Both management and labor have devoted substantial resources in attacking this issue internally within each

railroad. Unfortunately, public perception of the railroad's success in enforcing its regulations is formed by nonrailroad sources. Public attention to the issue of drug and alcohol abuse enforcement is beneficial to the extent it motivates reasonable private and public action but detrimental to the extent it creates the impression that nothing is being done or that railroads are lax in enforcing their rules.

person's sense of fairness and reasonableness nor is there any outcry against such public use as being an unreasonable invasion of the motorist's right to privacy. In the case of railroad employees engaged in duties directly affecting public safety, the issue is not an abstract matter of the right to privacy — it is a question of public safety. Railroad employees do not have a right to privacy which rises above public interest in safety.

The railroads should be free to use state-of-the-art testing devices on a selective basis. A railroad should have the ability to expend its resources in an efficient manner and thus could pinpoint specific problem locations on an unannounced spot basis. Unless the railroad has the ability to set

the criteria for use of such devices it may be deprived of the ability to use the devices in a manner which effectively deters Rule G violations. Because of existing grievance procedures, there is very little chance that tests will be administered in an unreasonable manner.

Importantly, it is essential that the breath analysis test and similar tests be used and viewed as merely supplemental to existing methods of enforcing Rule G. The traditional methods of determining Rule G violations — incoherent speech, slurring, unsteady gait, smell of alcohol, etc. — will still be relied upon and serve as the basis for disciplinary action for Rule G violations.

In addition to using state-of-the-art testing devices on a controlled random basis, the railroads will be free to use them in

(3)

No. 88-1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF

HARRY A. RISSETTO
1800 M Street, N.W.
Washington, DC 20036
(202) 467-7000

DENNIS J. MORIKAWA*
MICHAEL J. OSSIP
SARAH A. KELLY
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000

BRUCE B. WILSON
JEFFREY H. BURTON
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103
(215) 977-5003

Attorneys for Petitioner, Consolidated Rail Corporation

Of Counsel:
MORGAN, LEWIS & BOCKIUS

September 6, 1988

* *Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 238-2000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE
SUPREME COURT OF THE UNITED STATES

No. 88-1

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY BRIEF

I. INTRODUCTION

Petitioner, Consolidated Rail Corporation ("Conrail") submits this brief in reply to certain issues raised in the Brief of Respondents Railway Labor Executives' Association, et al. ("RLEA") in Opposition to Conrail's Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

In its Petition for Writ of Certiorari, Conrail argued that this Court should grant the Petition for two reasons. First, the Third Circuit's conclusion that Conrail's addition of a drug screening test to its fitness for duty medical examinations created a "major" dispute under the Railway Labor Act ("RLA") placed its decision in direct conflict with prior decisions of the Courts of Appeals for the Seventh and Eighth Circuits. Second, without justification, the Third Circuit applied concepts unique to the National Labor Relations Act ("NLRA") to an issue arising under the Railway Labor Act ("RLA"). Conrail also urged that the important questions presented in this case should be resolved independently of

this Court's decision to grant or deny the pending Petition for Writ of Certiorari in the case of *Brotherhood of Locomotive Engineers v. Burlington N.R.*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed*, No. 87-1631 (April 1, 1988).[1]

In somewhat cursory fashion, the RLEA has responded to the above points. First, the RLEA contends that no inter-circuit conflict exists because the decisions of the Seventh and Eighth Circuits are distinguishable on their facts.[2] Second, the RLEA argues that the Third Circuit applied a traditional "major" versus "minor" dispute analysis in deciding the issue before it, and therefore there is no reason for this Court to disturb the Third Circuit's decision. Finally, the RLEA contends that this Court should not grant *certiorari* because Congressional legislation in the form of new drug testing bills will soon render moot any controversy over drug testing in the railroad industry. The RLEA has ignored what it chooses not to see. The inter-circuit conflict could not be clearer. The appellate courts need guidance in applying the RLA's major-minor dispute analysis

1. The RLEA agrees with Conrail's position that if the Court determines that there is sufficient overlap between this case and *Brotherhood of Locomotive Engineers v. Burlington N.R.*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed*, No. 87-1631, (April 1, 1988) it may wish to defer action on this case pending its decision in *Burlington N.* (Opp. Cert. 9). The issue in the Ninth Circuit's decision in Burlington Northern was whether drug testing for purposes of Rule G enforcement was a major or minor dispute.

2. The RLEA also argues that the Court's denial of the petition for certiorari filed in *Brotherhood of Maintenance of Way Employees v. Chicago & N.W. Transp. Co.*, 827 F.2d 330 (8th Cir. 1987), *cert. denied*, U.S. , 108 S. Ct. 1291 (1988) should somehow be dispositive of the Court's decision with respect to the question presented here. However, that case is clearly factually distinguishable from the question presented here. In *Chicago & N.W.*, the union challenged the validity of a railroad's amendment of Rule G to prohibit off-duty use or possession of illegal drugs. Drug testing was not at issue.

without relying on NLRA principles. What Congress may do in late 1988 will not make moot what Conrail did in early 1987.

II. ARGUMENT

A. The RLEA Has Failed to Address the Conflicting Decisions of the Seventh and Eighth Circuits on the Identical Issue

In its brief, the RLEA correctly notes that, "In reaching its decision [that Conrail's fitness-for-duty drug testing is a major dispute under the RLA], the Third Circuit acknowledged that three other courts of appeal have considered *the same* or similar drug-testing issues under the RLA, with varying results and rationales." (Opp. Cert. 6) (emphasis added). The Third Circuit itself recognized that the issue it was deciding was identical to issues previously decided by both the Seventh and Eighth Circuits. The Third Circuit expressly said of the Seventh Circuit decision:

> *Railway Labor Executives Association v. Norfolk and Western Railway Co.*, 833 F.2d 700 (7th Cir. 1987), presented the Seventh Circuit with issues *almost identical* to those we confront here. *As here*, the railroad added a drug screen to the urinalysis that had been a routine element of the medical examination.

(Pet. App. A-12 to A-14; citations omitted; emphasis added). The Third Circuit likewise implicitly acknowledged that the medical testing issue decided by the Eighth Circuit was the same as the issue considered in this case, when it recognized that there were two separate issues before the Eighth Circuit:

> There were two separate testing issues before the Eighth Circuit in *Brotherhood of Maintenance of*

> *Way Employees v. Burlington Northern Railroad Co.*, 802 F.2d 1016 (8th Cir. 1986). One, *which is not at issue here*, concerned the railroads' institution of post-incident testing to enforce Rule G.
>
> * * *
>
> The [Eighth Circuit] divided on the second issue, the railroad's institution of a drug screen as part of its periodic and return-to-duty medical exams. Two members of the court tersely reversed the district court's finding that the medical examination screening presented a major dispute.

(Pet. App. A-12 to A-14; citations omitted; emphasis added).

Notwithstanding the Third Circuit's own acknowledgement that its decision is in direct conflict with the Seventh and Eighth Circuits, the RLEA gratuitously submits that ". . . these cases can be distinguished on the specific facts of each case." (Id.)[3] However, as to this critical issue, the RLEA makes no attempt to explain to the Court why those cases are factually distinguishable. The RLEA has failed to set forth any factual distinction between this case and the Seventh and Eighth Circuit decisions. Its failure to do so bespeaks the similarity of those cases.

The need for the Court to resolve the inter-circuit conflict is greater now than when the Petition was first filed. As the case law in this area develops it becomes even more confused. In a recent decision in *Railway Labor Executives' Ass'n v. National Railroad Passenger Corp.*, No. 86-1235, (D.D.C. August 3, 1988) ("Amtrak")(see Appendix to Petitioner's Reply Brief), the United States District Court for the District of

3. Neither *Railway Labor Executives' Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700 (7th Cir. 1987) nor *Brotherhood of Maintenance of Way Employees v. Burlington N.R.*, 802 F.2d 1016 (8th Cir. 1986) is even cited in Respondent's brief.

Columbia held that Amtrak's addition of a drug screening test to its medical fitness-for-duty urinalysis created a major dispute under the RLA. Like Conrail, Norfolk and Western, and Burlington Northern, Amtrak had previously included urinalyses as part of its fitness-for-duty medical examinations, and the unions had acquiesced in this requirement. In April of 1983, Amtrak added a drug screening component to the urinalyses in all return-to-duty physical examinations. In July 1985, Amtrak added drug screens to all periodic physical examinations.

The district court in Amtrak noted the contrary decisions of the Seventh and Eighth Circuits, but chose instead to follow the reasoning of the Third Circuit. The district court's decision in the Amtrak case has been appealed to the Court of Appeals for the District of Columbia Circuit, *National Railroad Passenger Corp. v. Railway Labor Executives' Ass'n, appeal filed*, No. 88-7189, (D.C. Cir. August 8, 1988) thereby creating the possibility of further inter-circuit conflict. Clearly, the courts of appeals need guidance from the Court in applying RLA standards, in order to resolve this burgeoning area of conflict.

B. The Courts of Appeals Need Guidance on the Applicability of NLRA Principles to Cases Arising Under the RLA

The Third Circuit's decision in this case, as well as the decision of the district court in the Amtrak case and arguments raised in the RLEA's Brief, demonstrate the confusing overlap of RLA and NLRA principles in this area of the law, clearly showing the necessity of guidance from the Court. The RLEA's contention that the Third Circuit has correctly applied the RLA's major-minor dispute standard to this case (Opp. Cert. 6-7), mistakenly assumes that NLRA standards may be freely borrowed and applied to RLA cases. In particular, the

RLEA relies, as does the Third Circuit, on the determination of the General Counsel of the National Labor Relations Board ("NLRB") that drug testing should be a mandatory subject of bargaining under the NLRA, (Opp. Cert. 8), in order to conclude that it is a major dispute subject to bargaining under the RLA.[4] The Third Circuit and the RLEA conclude that the NLRB General Counsel's determination that drug testing was a mandatory subject of bargaining under the NLRA, and that a union's past acquiescence in drug screening did not constitute a waiver of its right to bargain under the NLRA, was sufficient to justify the conclusion that drug testing is a major dispute under the RLA.

The Court recently affirmed in *Communication Workers of America v. Beck*, U.S. , 108 S. Ct. 2641 (1988), that RLA and NLRA analogies are appropriate only after painstaking review of the statutory language, legislative history, congressional intent and institutional history under both statutes.[5] However, the Third Circuit uncritically borrowed an analysis of the duty to bargain under one labor statute, the NLRA, and applied it to another labor statute, the RLA. In so doing, the Third Circuit contradicted the Court's advice that "the NLRA and RLA differ in crucial respects," *Communication Workers of America v. Beck, supra*, 108 S.Ct. at 2648.

As Conrail argued in its Petition, the standards under the two statutes for determining when an employer must bargain are not the same. On the contrary, the RLA standard of whether a disputed action is

4. This mistaken assumption has also been made by the District of Columbia district court in *Railway Labor Executives' Ass'n v. National Railroad Passenger Corp., supra.*

5. Following such a detailed analysis, the Court ruled that the provisions of Section 2, Eleventh of the RLA and Section 8(a)(3) of the NLRA governing union security provisions in collective bargaining agreements and the payment of union dues and fees are "statutory equivalents."

arguably justified under the collective bargaining agreement (and thus is a minor dispute) differs fundamentally from the NLRA standard of whether a union has clearly and unmistakenly waived the right to bargain. The NLRA imposes a heavy burden on the employer to demonstrate the union's waiver. If a waiver has occurred, the matter is ended. On the other hand, the RLA imposes only the relatively light burden of showing that a practice is arguably justified. If this threshold is met, the matter is referred to arbitration. Thus, the entire focus of the RLA's distinction between major disputes, which are bargainable, and minor disputes, which are subject to arbitration, is whether the challenged practice is permitted by the parties' existing practices or arguably justified under their collective bargaining agreement. The Third Circuit erred by applying NLRA concepts to the RLA case before it. Only this Court can correct the Third Circuit's error and state clearly the distinctions between the two statutes as they affect the process of collective bargaining.

The Third Circuit apparently failed to apply the proper RLA major-minor dispute analysis because the factual dispute involved drug testing. The RLEA argues that because drug testing is an important social issue, with potential for intrusion into employees' privacy, this singular consideration is enough to make drug testing in any form a major dispute under the RLA. Moreover, the RLEA contends that "[t]his case would reach constitutional proportions but for the fact that the testing is not mandated by a public agency." (Opp. Cert. 7).[6] How-

6. The district court decided that there was no constitutional issue involved in this matter because Conrail is not a federal actor subject to constitutional scrutiny. The Third Circuit noted that the RLEA did not appeal that portion of the district court's opinion to the Third Circuit. (Pet. App. A-6; A-25 to 26). Thus, this case presents no constitutional question for the Court to decide. The constitutional question of whether government mandated drug testing of railroad employees violates the Fourth Amendment will

ever, the importance of the underlying issue, or the magnitude of its impact on employee privacy, is not the test for determining whether a dispute is major or minor under the RLA. The RLA test is whether the practice is arguably justified under the parties' collective bargaining agreement or under their existing practices, not whether drug testing is a major or minor societal issue. Absent guidance from the Court, lower courts will continue to borrow incompatible statutory standards and to decide issues on a case-by-case basis. In doing so, they may distort well-established RLA principles which may have far reaching consequences for other areas covered by the RLA.

C. Pending Legislation Would Not Make This Controversy Moot.

The RLEA has argued that legislation pending in Congress would make the instant litigation moot because this legislation will clarify railroads' rights and obligations in conducting drug testing. (Opp. Cert. 9-10). However, pending legislation would not make this controversy moot, nor will it deal with those Conrail employees who have already been medically disqualified based on fitness for duty examinations because of positive drug test results. Whether Conrail had the right to institute its fitness-for-duty drug testing in February 1987, and remove from service employees who tested positive, is not a question that will be answered by the passage of future legislation. If this Court determines that Conrail did not have the right to add a drug screening test to its fitness-for-duty urinalyses, Conrail would be required to cease its current testing program, and any employees who have been disqualified under

NOTES *(Continued)*
be considered by the Court in its next term in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, U.S. , 108 S. Ct. 2033 (1988).

the program may be entitled to remedies under the Railway Labor Act. However, if it is determined that Conrail's addition of the drug screen to its fitness-for-duty medical examination is a minor dispute, affected employees would have the right to arbitrate their claims, including whether the drug screen was applied fairly.

Meanwhile, the pending legislation may or may not be passed in the near future, and the question of the right of railroads to conduct drug testing will remain mired in continuing court challenges by the RLEA. Indeed, it is disingenuous of the RLEA, having brought court challenges to both government mandated and private drug testing programs in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, U.S. , 108 S. Ct. 2033 (1988), *Railway Labor Executives' Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700 (7th Cir. 1987), *National Railroad Passenger Corp. v. Railway Labor Executives' Ass'n*, No. 86-1235 (D.D.C. August 3, 1988), *appeal filed*, No. 88-7189, (D.C. Cir. August 8, 1988) and the instant case, to argue now that the question is more appropriately answered by legislation.

III. CONCLUSION

For all of the reasons set forth above and in its original Petition, Conrail respectfully requests that its Petition be granted.

Respectfully submitted,

HARRY A. RISSETTO
1800 M Street, N.W.
Washington, DC 20036
(202) 467-7000

Of Counsel:
MORGAN, LEWIS
& BOCKIUS

DENNIS J. MORIKAWA*
MICHAEL J. OSSIP
SARAH A. KELLY
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000

BRUCE B. WILSON
JEFFREY H. BURTON
CONSOLIDATED RAIL
CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103
(215) 977-5003

Attorneys for Petitioner,
Consolidated Rail Corporation

*Counsel of Record

REPLY APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,	:	
Plaintiffs	:	
	:	Civil Action
v.	:	No. 86-1235
	:	
NATIONAL RAILROAD PASSENGER CORPORATION,	:	
Defendant	:	

MEMORANDUM OPINION

The issue in this case is whether Amtrak's unilateral imposition of drug testing on its employees gives rise to a "minor" dispute under the Railway Labor Act over which this Court lacks subject matter jurisdiction or to a "major" dispute entitling the parties to an injunction maintaining the status quo while they bargain over the change.

The Court finds that drug testing is a substantial change in the employees' terms and conditions of employment not arguably predicated on an existing agreement and shall issue the injunction sought by plaintiffs. The case is before the Court on cross-motions for summary judgment. The Court finds that no genuine issues of material fact remain for trial and plaintiffs are entitled to summary judgment as a matter of law pursuant to Fed. R. Civ. P. 56.

BACKGROUND

The Railway Labor Executives' Association, which is an association of railway labor unions, and a number of unions representing railway workers (collectively "the unions") have sued the National Railroad Passenger

Corporation (Amtrak), a private entity created by Congress in 1972 to provide intercity rail passenger service.

The collective bargaining contracts between the unions and Amtrak are silent on drug testing, physical examinations, and the use of alcohol or drugs. However, agreements include not only express terms, but terms implied by well-established past practice and by law. *See Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 153-54 (1969). Amtrak contends past practice provides a basis for drug testing of its employees.

For a number of years, Amtrak has required physical examinations of its employees. These examinations are conducted before an employee is hired, when an employee returns to work from a non-vacation absence of more than 30 days, and, for employees covered by the Hours of Service Act, 45 U.S.C. §§61-66 (1982),[1] periodically.[2] The medical standards and tests administered in these physical examinations have changed from time to time with medical developments, and Amtrak asserts that it has become established practice for the railroad to unilaterally make such changes.

Since the mid-1970s, the physical examinations have routinely included urinalysis, although a drug screen was not initially part of the urinalysis. A drug screen was performed only when, in the judgment of the examining physician, the employee may have been using drugs. In April, 1983, Amtrak began requiring a drug screen as part of the urinalysis in pre-employment

1. The Hours of Service Act covers employees who operate trains, handle train orders and other instructions regarding train movements, and construct, maintain, or repair signal systems. The Act does not cover supervisory employees, maintenance of way and car force employees, and members of other non-operating crafts.

2. Locomotive engineers must undergo physical examinations annually. Others covered by the Hours of Service Act must be examined every three years up to age 55, every two years up to age 69, and annually thereafter.

and return-to-work physical examinations. In July, 1985, Amtrak began requiring a drug screen as part of every mandatory physical examination, including periodic physicals.

Amtrak also requires urinalysis drug screening outside the context of a medical examination when there exists reasonable suspicion that an employee may be under the influence of alcohol or a drug. The record suggests the railroad began testing based on reasonable suspicion less than a year before this lawsuit was filed; previously, the railroad relied on supervisory observation to detect drug or alcohol impairment.

A rule of conduct, unilaterally implemented by the railroad, prohibits on-duty employees from working while under the influence of alcohol or drugs. That provision, asserted by Amtrak without contradiction by the unions to be long-standing, was known in prior years as Rule C and stated as follows:

> Reporting for work under the influence of alcoholic beverages or narcotics, or the use of alcoholic beverages while on or subject to duty or on Company property is prohibited.

In early 1985, Amtrak revised the rule, now designated as Rule G, to state as follows:

> Employees subject to duty, reporting for duty, or while on duty, are prohibited from possessing, using, or being under the influence of alcoholic beverages, intoxicants, narcotics or other mood changing substances, including medication whose use may cause drowsiness or impair the employee's responsiveness.

On April 15, 1986, Amtrak issued a 12-page document detailing its policy and procedure for drug and alcohol testing of employees covered by the Hours of Service Act. On January 1, 1987, the railroad issued a similar document for employees not covered by the

Hours of Service Act. Amtrak characterizes the documents as "modifications and codifications of Amtrak's pre-existing policies and practices."

The main difference in the two documents concerns post-accident testing, which is authorized for employees covered by the Hours of Service Act.[3] The documents state that an employee who tests positive for drugs or alcohol is subject to discipline and shall not be allowed to work until testing negative. An employee who tests positive three times in a row is subject to dismissal.

In a separate notice to employees covered by the Hours of Service Act, Amtrak warned that the urine test may detect off-duty drug use, without any on-the-job impairment, for up to 60 days. Unless the employee demands a blood test, a positive urinalysis "will support a presumption that you were impaired at the time the sample was taken."[4]

---

3. The Federal Railroad Administration regulation requiring mandating post-accident blood and urine tests has been held to violate the Fourth Amendment. *Railway Labor Executives' Association v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, 108 S. Ct. 2033 (1988). The Ninth Circuit addressed the constitutionality of the government's *requiring* post-accident testing, of course, not the legality of the railroad imposing such testing unilaterally.

4. On August 15, 1987, while this lawsuit was pending, Amtrak revised its policy and advised employees that blood test results would no longer be relevant in a Rule G case because "Amtrak considers the mere presence of a drug in an employee's system as a violation of Amtrak Rule G. Hence, the objective of Amtrak's Drug/Alcohol Testing Program is not to determine influence, but to determine whether or not a prohibited substance is present in an employee's system." Amtrak Washington Division Notice 4-25 (Aug. 13, 1987), Exh. 1 to Plaintiffs' Reply to Defendant's Motion for Summary Judgment. In other words, it no longer matters to the railroad whether an employee is under the influence of a drug or impaired in any way; clearly, Amtrak has imposed a disciplinary rule based on employee's off-duty conduct, a departure from past practice that in itself has been held to constitute a major dispute. *See Brotherhood of Maintenance of Way Employees v. Chicago & North Western Transportation Co.*, 827 F.2d 330 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1291 (1988); *International Association of Machinists & Aerospace Workers v. Trans World Airlines*, No. 87-0403, slip op. at 23-25 (D.D.C. May 16, 1988).

The first grievance concerning Amtrak's modifications of its drug testing procedures was filed in April, 1986, by the Brotherhood of Maintenance of Way Employees, a plaintiff here. A number of similar grievances are now pending. This lawsuit was filed on May 2, 1986.[5]

The unions contend drug testing is not arguably justified by the established past practices relating to physical examinations and the prohibition against on-duty use of drugs or alcohol. Amtrak urges a much broader finding of what is implicit in the agreements between the railroad and the unions:

> Amtrak has had a long-standing and established practice of unilaterally: (1) developing and implementing comprehensive medical fitness standards and programs, including mandatory physical examinations and tests; (2) requiring urinalysis as part of all mandatory physical examinations; (3) requiring drug testing as a part of these urinalysis procedures; (4) revising or changing its medical standards including the battery of tests used in those mandatory physical examinations; (5) developing and implementing medical standards and policies, including revisions and expansions of its Rules of Conduct such as Rule G; and (6) developing and implementing a comprehensive drug and alcohol rehabilitative program (EAP) [Employee Assistance Program].

Defendant's Opposition to Plaintiffs' Motion for Summary Judgment at 17 (footnote omitted).

---

5. Amtrak contends this lawsuit is barred by the statute of limitations. Even assuming, *arguendo*, that a major dispute is subject to a statute of limitation, the defense must fail because the record does not establish when the plaintiffs were notified of the changes being litigated.

It is a question of fact whether a practice or custom has become part of the contract by implication through long-standing observance or acquiescence of the parties. *See, e.g., Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087, 1091 (9th Cir. 1988), *petition for cert. filed*, 56 U.S.L.W. 3720 (U.S. Apr. 1, 1988) (No. 87-1631); *Railway Labor Executives' Association v. Norfolk & Western Railway Co.*, 833 F.2d 700, 705-06 (7th Cir. 1987). The Supreme Court has framed the inquiry as whether the practice has "occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions." *Detroit & Toledo Shore Line Railroad Co. v. United Transportation Union*, 396 U.S. 142, 154 (1969). The Eighth Circuit has stated that a "long-standing practice" should be considered part of the agreement when it "ripens into an established and recognized custom between the parties." *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986).

In this case, the Court cannot find that Amtrak's practice of requiring drug testing, either in physical examinations or based on reasonable suspicion, has occurred for a sufficient period of time, with the knowledge and acquiescence of the unions, to become part of the agreement itself. The record does not reflect when Amtrak began testing based on reasonable suspicion, which precludes a finding that the practice was long-standing and established before the unions challenged the practice in April and May, 1986.[6] Drug testing was

6. In their Memorandum in Response to Plaintiffs' Supplemental Submissions, filed July 27, 1988, Amtrak's attorneys state that reasonable suspicion drug testing began "shortly after" Rule G was promulgated in 1985. However, the affidavit cited does not provide any date for the introduction of reasonable suspicion testing. At any rate, testing based on reasonable suspicion cannot be considered a "long-standing" or "established" practice if it began in 1985, the year before the practice was challenged in this lawsuit.

not required in pre-employment and return-to-work physical examinations until April, 1983, and in periodic physical examinations until July, 1985. At the most, routine drug testing was required for three years before the unions objected formally: in the case of periodic physical, the unions objected after nine months. This is not the length of time required for a practice to become so "long-standing" and "established" that it ripens into an implied working condition and an implied part of the collective bargaining agreement.

On the other hand, the Court finds that routine medical examinations and the rule against use of drugs or alcohol on duty are so well-established and long-standing as to be an implied working condition.

DISCUSSION

Relations between the unions and Amtrak are governed by the Railway Labor Act ("the Act"), 45 U.S.C. §§151-188 (1982). The Act is designed to provide for the prompt and orderly settlement of both fundamental contractual disputes and of grievances between the unions and management, to avoid the disruption of commerce caused by strikes or other means of self-help by either side. *Id.* §151a. The Act imposes on both the unions and the railroad a duty to negotiate whenever a dispute arises. *Id.* §152 First, Second. Beyond the initial stages of negotiation, the Act treats "major" and "minor" disputes differently.

The terms "major dispute" and "minor dispute" are not found in the Act, but have been supplied by the case laws. The Act speaks of "changes in agreements affecting rates of pay, rules, or working conditions," *id.* §156, as one kind of dispute, and of "disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working

conditions," *id.* §153(i), as another. The accepted distinction between major and minor disputes is found in *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711 (1945), where the Supreme Court said major disputes are those arising

> over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertions of rights claimed to have vested in the past.

Id. at 723.

> A minor dispute, on the other hand,
>
> contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future.

Id.

Major changes in the relationship between employees and the railroad may not be implemented unilaterally. For a major dispute, involving a change in the rates of pay, rules, or working conditions in a way not contemplated by the collective bargaining agreement, the parties must provide notice of the intended change and attempt to resolve it through negotiation, mediation, and possible presidential intervention. If a major dispute cannot be resolved, the union can strike in support of its position. *Railway Labor Executives' Association v. Norfolk & Western Railway Co.*, 833 F.2d 700, 704 (7th Cir.

1987); *see* 45 U.S.C. §156. In a minor dispute, on the other hand, minor changes in working conditions may be implemented unilaterally while settlement is sought through arbitration before the National Railroad Adjustment Board (NRAB). *See id.* §153. A minor dispute cannot be the subject of a strike.

The question of whether a dispute is major or minor determines the extent to which a federal court may become involved. If the dispute is major, the courts have broad powers to enjoin unilateral action by either side to preserve the status quo while statutory settlement procedures go forward. Such an injunction may issue without regard to the usual balancing of the equities. If the dispute in only minor, the court's power is more limited since the NRAB has exclusive jurisdiction over minor disputes. The traditional power to enjoin under equitable principles remains, but injunctive relief is usually inappropriate because irreparable loss and inadequacy of the legal remedy cannot plainly be shown until the NRAB has had an opportunity to act.[7] *See Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.*, 802 F.2d 1016, 1021-22 (8th Cir. 1986).

Whether a dispute is major or minor depends on whether it is arguably comprehended within the agreement of the parties. As an initial step, the Court must determine what that agreement is. This factual inquiry has been completed here.

The test in this Circuit for determining whether a dispute involves only the interpretation or application of an existing agreement (and is therefore minor) or involves the formation of a collective agreement or a unilateral effort to change working conditions (and is therefore major) was established in *Southern Railway*

---

7. The unions sought injunctive relief even if the Court found the dispute to be minor. This request is mooted by the Court's conclusion that the dispute is major.

Co. v. Brotherhood of Locomotive Firemen & Enginemen, 384 F.2d 323 (D.C. Cir. 1967):

> [W]here the railroad asserts a defense based on the terms of the existing collective bargaining agreement, the controversy may not be termed a "major" dispute unless the claimed defense is so obviously insubstantial as to warrant the inference that it is raised with intent to circumvent the procedures prescribed by §6 [45 U.S.C. §156] for alteration of existing agreements.

Id. at 327. "Only if . . . the contract were not reasonably susceptible to the carrier's contention would this be a §6 dispute proper for a 'status quo' injunction." *International Brotherhood of Electrical Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1173 (D.C. Cir. 1972) (emphasis omitted) (quoting *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972) (footnote omitted)), *cert. denied*, 411 U.S. 906 (1973). "But where the position of one or both of the parties is expressly and arguably predicated on the terms of the agreement, as illuminated by long-standing practices, the question of whether the position is well taken involves a minor dispute." *Id.* at 1172 (emphasis omitted) (quoting *Switchmen's Union v. Southern Pacific Co.*, 398 F.2d 443, 447 (9th Cir. 1968). Other circuits use different formulations,[8] but the result is the

8. *E.g., Independent Federation of Flight Attendants v. Trans World Airlines*, 655 F.2d 155, 158 (8th Cir. 1981) (dispute minor if agreement "reasonably susceptible" to interpretation advanced); *REA Express, Inc. v. Brotherhood of Railway, Airline, and Steamship Clerks*, 459 F.2d 226, 231 (5th Cir.) ("arguable basis"), *cert. denied*, 409 U.S. 892 (1972); *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087, 1091 (9th Cir. 1988) ("arguably justified"), *petition for cert. filed*, 56 U.S.L.W. 3720 (U.S. Apr. 1, 1988) (No. 87-1631).

The First and Third Circuits have adopted the "obviously insubstantial" test of this Circuit. *See United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542, 544 (3d Cir. 1974); *Airlines Stewards & Stewardesses Association v. Caribbean Atlantic Airlines*, 412 F.2d 289, 291 (1st Cir. 1969). The Seventh Circuit uses the "obviously insubstantial" test and also asks whether the claim of contractual justification is "frivolous." *See Atchison, Topeka & Sante Fe Railway Co. v. United Transportation Union*, 734 F.2d 317, 321 (7th Cir. 1984).

The Sixth Circuit uses both the "arguably justified" and "obviously insubstantial" standards. *See Local 1477 United Transportation Union v. Baker*, 482 F.2d 228, 230 (6th Cir. 1973).

same: the burden on the party proposing the change is relatively light. When in doubt, courts generally construe disputes as minor, as such a finding is less likely to result in disruption of commerce.

In this instance, the Court must determine whether the new practice of drug testing is arguably predicated on the agreement between the unions and Amtrak, including implied terms. To find that the agreement arguably justifies drug testing, the Court must determine "that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue." *Railway Labor Executives' Association v. Consolidated Rail Corp.*, 845 F.2d 1187, 1193 (3d Cir. 1988).

Stripped to its essentials, Amtrak's argument is that the established past practices involving medical fitness for duty standards, physical examinations, and enforcement of rules against alcohol and drug use on the job arguably justify the new practice of drug testing during physical examinations and based on reasonable suspicion. The Court, however, finds it implausible to believe, based on the unions' acquiescence in the established past practices, that there was a meeting of the minds on the general issue of drug testing.

The Court notes that the circuits have split when similar issues have been presented under the Railway Labor Act. *Compare Railway Labor Executives' Association v. Norfolk & Western Railway Co.*, 833 F.2d 700 (7th Cir. 1987) (addition of drug testing to all physical

examinations constitutes minor dispute) *and Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern Railroad Co.*, 802 F.2d 1016 (8th Cir. 1986) (introduction of post-accident and return-to-work drug testing minor dispute) *with Railway Labor Executives' Association v. Consolidated Rail Corp.*, 845 F.2d 1187 (3d Cir. 1988) (addition of drug testing to all physical examinations major dispute); *International Brotherhood of Teamsters v. Southwest Airlines*, 842 F.2d 794 (5th Cir. 1988) (introduction of post-accident and reasonable suspicion drug testing major dispute); *and Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087 (9th Cir. 1988) (introduction of post-accident drug testing major dispute), *petition for cert. filed*, 56 U.S.L.W. 3720 (U.S. Apr. 1, 1988) (No. 87-1631). While the decisions are enlightening, the Court is mindful that each is grounded on factual determinations of the scope of the agreement between the parties, and are not dispositive of the issues framed by this case.

Clearly, however, some courts have found mandatory drug testing to be arguably justified as a refinement of either the practice of subjecting employees to medical examinations or the practice of enforcing the rule against alcohol or drug impairment. Other courts have reached contrary conclusions. In this regard, the Court finds the views of Rosemary Collyer, General Counsel of the National Labor Relations Board, quite helpful. Collyer has stated unequivocally that mandatory drug testing constitutes a "substantial change in working conditions" even where there is an existing program of mandatory physical examinations and even where established work rules preclude the use or possession of drugs on the job.

> In cases where an employer has an existing program of mandatory physical examinations for employees or applicants, an issue arises as to whether the addition of drug testing constitutes a substantial change in the employees' terms and conditions of employment. In general, we conclude that it does constitute such a change. When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination. Generally, a physical examination is designed to test physical fitness to perform the work. A drug test is designed to determine whether an employee or applicant *uses* drugs, irrespective of whether such usage interferes with the ability to perform work. In addition, it is our view that a drug test is not simply a work rule — rather, it is a means of policing and enforcing compliance with a rule. There is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is being broken. Moreover, a drug test is intrinsically different from other means of enforcing legitimate work rules in the degree to which it may be found to intrude into the privacy of the employee being tested or raise questions of test procedures, confidentiality, laboratory integrity, etc. The implementation of such a test, therefore, is a "material, substantial, and . . . significant change in [an employer's] rules and practices . . . which vitally affect[s] employee tenure and conditions of employment generally.
>
> NLRB General Counsel's Guideline Memorandum Concerning Drug or Alcohol Testing of Employees, Memorandum GC 87-5, at 6 (Sept. 8, 1987), *reprinted in* Daily Labor Report No. 184, at D-1, D-2 (Sept. 24, 1987).

The Court agrees with the learned General Counsel for the NLRB that the addition of drug testing to physical examinations is a substantial change in working conditions. The railroad unions' acquiescence in

physical examinations, even those including urinalysis, cannot even arguably justify a conclusion that there was a meeting of the parties' minds on the general issue of drug testing. Addition of drug testing to physical examinations is a significant departure from past practice and a substantial change in the terms of the agreement. This plainly is not a dispute in the nature of a grievance relating "either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Elgin, Joliet & Eastern Railway Co. v. Burley*, 325 U.S. 711, 723 (1945). Rather, it is an attempt to "change the terms" of an agreement. *Id.*

Nor is mandatory drug testing based on reasonable suspicion a mere refinement of long-standing methods used to enforce Rule G. The Court finds that the primary method of enforcing the rule against alcohol or drug use on the job was by supervisory observation. Supervisors acted only when they observed objective signs of drug or alcohol use such as slurred speech, staggering gait, bloodshot eyes, sudden changes in personality, or increased absenteeism. Drug testing is intrinsically and significantly different from supervisory observation; it is more intrusive, it reveals information about the off-duty conduct of employees, and it raises a host of concerns about accuracy and reliability, interpretation of the test results, confidentiality, and so forth.[9] The Court is unable to conclude that the unions' acquiescence in the past practice of Rule G and its enforcement by sensory observation arguably justifies drug testing.[10] Amtrak's

9. It is significant that when conducted by government, urinalysis drug testing is a search and seizure within the meaning of the Fourth Amendment. *E.g., National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987). Observation by supervisors, of course, does not constitute a search or seizure.

10. The General Counsel of the NLRB reached a similar conclusion. "[A] union's acquiescence in a past practice of requiring applicants and/or current employees to submit to physical examinations that did not include drug testing, or in a rule prohibiting the use or possession of drugs on company premises, does not constitute a waiver of the union's right to bargain over drug testing." NLRB General Counsel's Guideline Memorandum at 9, *reprinted* in Daily Labor Report No. 184, at D-2.

program is a dramatic departure from past practice, where drug testing was conducted during physical examinations only when, in the judgment of the examining physician, the employee may have been using drugs. The current program, imposed unilaterally by the railroad, encompasses testing in circumstances where there is no suspicion whatsoever.

CONCLUSION

This case does not deal with the legality of private employers' requiring a drug test as a condition of employment, or the constitutionality or propriety of drug testing generally. "It deals only with the rights of a collective bargaining representative to participate in the formulation of a mandatory drug testing program, to negotiate over the shape that program will take." *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794, 799 (5th Cir. 1988). "The determinative factors are not whether drugs are dangerous, or whether drug testing is intrusive, but whether the program of mandatory testing and punishment chosen by [the carrier] is consistent with the collective bargainaing [sic] agreement. . . ." *Id.* Railroads other than Amtrak have been ordered by the courts to resolve these issues by reference to established principles under the Railway Labor Act; in at least one instance railroad and union have negotiated in good faith and reached agreement on a drug and alcohol policy. *See* Agreement Between CSX Transportation, Inc., and the Chesapeake and Ohio Railway Company and Its Employees Represented by United Transportation Union (Aug. 6, 1987),

Exh. 4 to Plaintiffs' Reply to Defendant's Motion for Summary Judgment.

In summary, both justifications proffered by Amtrak for its drug testing are "so obviously insubstantial as to warrant the inference that [they are] raised with intent to circumvent the procedures prescribed by §6 for alteration of existing agreements." *Southern Railway Co. v. Brotherhood of Locomotive Firemen & Enginemen*, 384 F.2d 323, 327 (D.C. Cir. 1967).

The imposition of drug testing gives rise to a major dispute entitling the unions to an injunction maintaining the status quo while they bargain with Amtrak over the issue.[11] An appropriate Order accompanies this Memorandum Opinion.

/s/ THOMAS F. HOGAN
Thomas F. Hogan
United States District Judge

DATE: August 3, 1988

11. Count III of the unions' complaint alleges a violation of the Fourth Amendment. Plaintiffs have failed to show for purposes of this lawsuit that Amtrak is a federal actor whose actions are subject to constitutional scrutiny. They claim Amtrak is a governmental enterprise because it was created by Congress and relies heavily on federal funds. This argument has been uniformly rejected by federal courts and this Court concurs in their analysis. *See, e.g., National Railroad Passenger Corp. v. Two Parcels of Land*, 882 F.2d 1261, 1264 (2d Cir.), *cert. denied*, 108 S. Ct. 347 (1987); *Anderson v. National Railroad Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984); *Hankin v. National Railroad Passenger Corp.*, No. 86 C 7233, slip op. at 6 (N.D. Ill. Nov. 9, 1987); *Kimbrough v. National Railroad Passenger Corp.*, 549 F. Supp. 169, 172-73 (M.D. Ala. 1982); *Moorhead v. National Railroad Passenger Corp.*, No. 81-1579, slip op. at 3-4 (D.D.C. Mar. 9, 1982).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*, *Plaintiffs*	:	
	:	Civil Action
v.	:	No. 86-1235
NATIONAL RAILROAD PASSENGER CORPORATION, *Defendant*	:	

ORDER

For the reasons set forth in the accompany [sic] Memorandum Opinion, it is this 3rd day of August, 1988,

ORDERED that plaintiffs' motion for summary judgment is granted; and it is

FURTHER ORDERED that defendant's motion for summary judgment is denied; and it is

FURTHER ORDERED that defendant is enjoined, pursuant to 45 U.S.C. §156, from implementing, with respect to Amtrak employees represented by the plaintiffs, its policy of requiring urinalysis drug and alcohol testing, pending exhaustion of the procedures set forth in the Railway Labor Act, 45 U.S.C. §156. This injunction shall not apply to toxicological testing mandated by federal law or regulation.

/s/ THOMAS F. HOGAN
Thomas F. Hogan
United States District Judge

No. 88-1

In the Supreme Court of the United States

October Term, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,
Respondents

On Writ of Certiorari To The United States Court of Appeals for the Third Circuit

JOINT APPENDIX

Lawrence M. Mann*
ALPER & MANN
Suite 811
400 First Street, N.W.
Washington, D.C. 20001
(202) 298-9191

Cornelius C. O'Brien, Jr.
CORNELIUS C. O'BRIEN, JR., P.C.
1760 Market Street,
Seventh Floor
Philadelphia, PA 19103
(215) 568-4343

Attorneys for Respondents Railway Labor Executives' Association, et al.

**Counsel of Record*

Harry A. Rissetto
1800 M Street, N.W.
Washington, D.C. 20036

Dennis J. Morikawa*
Michael J. Ossip
Sarah A. Kelly
MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5513

Bruce B. Wilson
Jeffrey H. Burton
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Attorneys for Petitioner Consolidated Rail Corporation

**Counsel of Record*

PETITION FOR CERTIORARI FILED JUNE 29, 1988
CERTIORARI GRANTED OCTOBER 3, 1988

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

154P

JOINT APPENDIX

TABLE OF CONTENTS

DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILING DATE MO	DAY	YEAR	J	N/S	O	D PTF	D DEF	R 23	$ DEMAND	JUDGE MAG. NO.	COUNTY	JURY DEM.	DOCKET YR.	DOCKET NUMBER
313	02	86	2698	05	07	86	3	740	1				Nearest $1,000	I344AS M	88888		86	2698

PLAINTIFFS

RAILWAY LABOR EXECUTIVES' ASSOCIATION;
AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSN., DIVISION OF BRAC;
AMERICAN TRAIN DISPATCHERS ASSOCIATION;
BROTHERHOOD OF LOCOMOTIVE ENGINEERS;
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES;
BROTHERHOOD OF RAILROAD SIGNALMEN;
BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES;
BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA;
HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION;
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS;
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS;
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
INTERNATIONAL BROTHERHOOD OF FIREMEN

ARB N

| vs. |

DEFENDANTS

CONSOLIDATED RAIL CORPORATION

AND OILERS;
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION;
NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION;
SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA;
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION;
TRANSPORT WORKERS UNION OF AMERICA;
UNITED TRANSPORTATION UNION

CAUSE RAILWAY LABOR ACT 45 U.S.C. 51 *et seq.*
(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

JA-2

ATTORNEYS

Cornelius C. O'Brien, Jr., Esq.
3608 Centre Square West
1500 Market Street
Philadelphia, PA 19102

CONSOLIDATED RAIL CORPORATION

By: Hermon W. Wells, Esq.
Six Penn Central Plaza
Phila., PA 19183-2959

Dennis J. Morikawa, Esq.
2000 One Logan Sq.
Phila., PA 19103

Anita W. Schoomaker, Esq.
1800 M Street, N.W.
Suite 800 - North
Washington, DC 20036

DATE	NR.	C.A. 86-2698 AS	PROCEEDINGS
1986			
1 MAY	07		Complaint, filed.
— "	07		Sumons exit. (Mailed to counsel.)
2 "	07		MOTION AND ORDER APPOINTING BARBARA WRIGHT TO SERVE THE SUMMONS AND COMPLAINT UPON THE DEFENDANT IN THIS ACTION, FILED. 5/8/86: Entered and copies mailed.
3 "	12		Return of summons with affidavit of Barbara Wright re: "served deft. on 5/9/86," filed.
4 "	28		Answer filed.
— "	28		ISSUE JOINED.
5 NOV	03		ORDER DATED 11/3/86, SCIRICA, J., THAT THE DATES SPECIFIED IN THE 7/23/86 PRETRIAL ORDER BE EXTENDED IN THE FOLLOWING MANNER: ALL DISCOVERY, WITH THE EXCEPTION OF DEPOSITIONS, BE COMPLETED BY 1/30/87; ALL DEPOSITIONS BY 2/28/87; THIS CASE SHALL BE PLACED IN THE TRIAL POOL ON 3/27/87; FINAL JOINT PRETRIAL ORDER BY 3/20/87, ETC., FILED. 11/3/86: Entered and copies mailed.

JA-3

1987		
6 FEB	12	STIPULATION & ORDER AS TO CERTAIN FACTS, FILED. 2/13/87: Entered and copies mailed.
7 MAR	10	CONSOLIDATED RAIL CORP.'S MOTION TO DISMISS COMPLAINT & FOR SUMMARY JUDGMENT, MEMO., CERT. OF SERV., FILED.
8 "	27	PLFFS' MOTION FOR SUMMARY JUDGMENT, CERT. OF SERV., MEMO., FILED.
9 APR	17	Reply Memo. in Support of Consolidated Rail Corp's Motion to Dismiss Complaint & for Summary Judgment, Cert. of Serv., filed.
10 "	28	ORDER THAT PLFFS' COMPLAINT IS DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION, ETC., FILED. 4/28/87: Entered and copies mailed.
11 MAY	15	Plffs' Notice of Appeal, filed. (87-1289) 5/18/87: Entered and copies to: C.C. O'Brien, Esq., H.W. Wells, Esq., D.J. Morikawa, Esq., A.W. Schoomaker, Esq., Judge Scirica, D. Spitz, U.S.C.A.
12 "	18	Copy of Clerk's Notice to U.S.C.A., filed.
13 "	21	Copy of Transcript Purchase Order, filed.
— "	21	RECORD COMPLETE FOR PURPOSES OF APPEAL-TRANSCRIPT NOT NEEDED.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case Closed

DOCKET No. 87-1289

Related Cases _____ CALENDARED FOR: 11-3-87

See C.A. Misc. Record No. _____

ORIGIN:	Eastern	DOCKETED: 5-20-87
DC DOCKET NO.	Civil 86-2698	☒ Fee Paid ☐ IFP ☐ CJA ☐ USA
DC JUDGE	Anthony J. Scirica	☐ CPC Granted _____
FILED IN DC	5-7-86	
NOA FILED	5-15-87	DISCLOSURE Applt./Pet. 8-27-87
CASE TYPE	CV – Railway Labor Act	STATEMENT Appee./Resp. 5-27-87

TITLE OF CASE	APPEARANCES
RAILWAY LABOR EXECUTIVES' ASSOCIATION; AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSN., DIVISION OF BRAC; AMERICAN TRAIN DISPATCHERS ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS,	APPELLANT/PETITIONER: Lawrence M. Mann, Esq. – 6-5-87 Alper & Mann 400 First Street, N.W., Suite 811 Washington, D.C. 20001 202-298-9191

EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION; SEAFARERS'; INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; UNITED TRANSPORTATION UNION,

Appellants

vs.

CONSOLIDATED RAIL CORPORATION

APPELLEE/RESPONDENT:
Sarah A. Kelly, Esq. – 6/8/88
Michael J. Ossip, Esq. – 6/8/88
Dennis J. Morikawa, Esq. – 6/1/87
Morgan, Lewis & Bockius
2000 One Logan Square
Phila., PA 19103
215-963-5761 [Ossip]/963-5473 [Kelly]
[Appellee, Consolidated Rail Corporation]
Bruce B. Wilson/Jeffrey H. Burton – 6/8/88
Associate General Counsel – 6/8/88
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Phila., PA 19103
215-977-5019 4041 [Wilson]/977-5001 [Burton]
[Appellee, Consolidated Rail Corporation]

JA-6

NO. 87-1289

RECORD, EXHIBITS & BRIEF INFORMATION/Filing:

5-26-87 Partial Rec. or Cert. List
____ Record on Appeal ☐ IMPOUNDED
Covers # ____
5-21-87 Not needed Transcript ordered None
____ Transcript filed in DC:

____ 1st Supp. Record
____ 2nd Supp. Record ____

____ Exhibits ☐ REC. RM. ☐ SAFE
____ Administrative Transcript
5-26-87 Briefing Notice Issued C5/26 Covers # ____
7-6-87 Brief for Applt. M.S. 7-6-87 (10cc)

8-3-87 Brief for Appee. M.S. 8-3-87 (10cc)
____ Brief for Appee. ____
____ Brief for Appee. ____
____ Reply B. for Applt. ____

____ Brief for Applt./ Cross Appee. ____
____ B. for Appee. Cross Applt./ ____

EXTENSION Flg. Motion for:	Ord. Fld.	Ext. to:
____ Record List		
____ Transcripts		
____ Applt's. Brief		
____ Appee's. Brief		
____ Appee's. Brief		
____ Appee's. Brief		
____ Reply Brief		

____ Appee. Appendix ____

RECORD & BRIEF INFORMATION (Co· ·):

Brief for Amicus ____

Brief for Intervenor ____

Appendix MS 7-6-87 10cc

JA-7

_____ Reply B. for Applt./
Cross Appee. _____

_____ Reply B. for Appee./
Cross Applt. _____

Appee. Appendix _____

Supp. Appendix _____

SUMMARY OF EVENTS
DISMISSALS: Rule 28 [ ] _____
ARGUED 11/3/87 — SEE BELOW
PANEL Sloviter, Becker, CJ & Cowen, DJ
REARGUED _____
JUDGMENT-ORDER _____
OPINION 4-25-88 ☐ Mem. Op. ☒ Signed ☐ P.C.N/P or Pub.
MO SLOVITER CO _____ DO _____
JUDGMENT Reversing & remanding to D.C. Costs
taxed against the appellee. (bj)

PET. FOR REHG. _____
☐ Denied ☐ Granted ☐ In Banc ☐ Panel

MANDATE FURTHER STAYED TO: 6-30-88
Rule 42(b) FURTHER STAYED TO 6-10-88
MANDATE STAYED TO: 6-1-88

MANDATE ISSUED _____
RECORD RETURNED _____
BILL OF COSTS 5-9-88 by
appellant, w/serv. (bj)

CERTIORARI FILED 6-30-88
☐ Denied ☒ Granted
10-3-88 S.C.# 88-1
Reported at 845 F2d 1187

DATE	FILINGS—PROCEEDINGS
1987	
Sept. 8	Copy of letter dd. 9-3-87 from Lawrence M. Mann, Esq., cnsel for aplts, purs. to Rule 28(j) FRAP, w/attachs., rec'd for the info. of the Ct. (sdt)
Sept. 18	Let dtd 9-18-87 from aplee rec'd for Ct's info. (ms)
Oct. 15	Letter dd. 10-13-87 from Cornelius C. O'Brien, Jr., Esq., cnsel for aplts, purs. to Rule 28(j) FRAP, w/attach., rec'd for info. of the Ct. (sdt)
Nov. 2	Letters dated 1-15-87 & 9-24-87 from aplt., rec'd for info. of the Court. (gt)
Nov. 3	At oral argmt. Ct. directed cnsl to have transcript of oral argmt. prepared for Ct. (ab)
Dec. 3	

Continued

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Railway

DOCKET NO. 87-1289

Page Two

DATE	FILINGS — PROCEEDINGS
1987	
Dec. 3	Letter from aplee. (Consolidated Rail Corp.) along with 7th Circuit's decision in appeal no. 87-1323, rec'd. (gt)
Dec. 4	Transcript of oral argument rec'd for info of Court. (as)
Feb. 8	Letter dated 2-1-88, pursuant to Rule 28(j), F.R.A.P. from aplt., rec'd. (gt)

May 5	Motion of appellee, (Conrail) for stay of Mandate, 30 days, to & including June 1, 1988, w/serv., fld. (bj)
May 6	Order (SLOVITER, C.J.) granting above motion to & incl June 1, 1988, fld. (bj)
May 27	Motion of Appellee (Conrail Corp) for Extension of Stay of Mandate, to and including July 24, 1988, w/serv. fld. (bj) (full 90 day stay) (bj)
June 1	Opposition to Motion of Appellee for Extension of Stay of Mandate, w/serv. fld. (bj)
June 2	Applee's Reply to Aplt's Opposition to Motion to Extend Stay of Mandate, w/serv., rec'd (bj)
June 6	Order (Sloviter, Becker & Cowen, C.J.'s) granting the stay of Mandate to and Including June 10, 1988, fld. (bj)
June 6	Copy of ltr dtd 6-2-88 from Cornelius C. O'Brien, Jr., Esq. addressed to Legal Dept. Con.Rail Corp. 1138 6 Penn Ctr Plaza Phila, PA, rec'd (bj)
June 7	Motion of Appellee Consolidated Rail Corp. for Reconsideration of this Ct's June 6, 1988 Order & for Extension of Stay of Mandate Until June 30, 1988, fld. (bj)
June 9	Order (Sloviter, Becker & Cowen, C.J.'s) granting the above Motion and the Stay of Mandate is extended until June 30, 1988, fld. (bj)
July 5	Certificate evidencing the docketing of this appeal from Clk of the Sup. Court, at S.C. #88-1 which was fild 6-30-88 in Sup. Ct., fld., (bj)

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION
400 FIRST STREET, N. W.
WASHINGTON, D. C. 20001

and

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSN., DIVISION OF BRAC
3 RESEARCH PLACE
ROCKVILLE, MARYLAND 20850

and

AMERICAN TRAIN DISPATCHERS ASSOCIATION
1401 S. HARLEM AVENUE
BERWYN, ILLINOIS 60402

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1112 B OF LE BUILDING
1365 ONTARIO AVENUE
CLEVELAND, OHIO 44114

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
12050 WOODWARD AVENUE
DETROIT, MICHIGAN 48203

and

CIVIL ACTION NO. 86-2698

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

BROTHERHOOD OF RAILROAD SIGNALMEN
601 WEST GOLF ROAD
MT. PROSPECT, ILLINOIS 60056

and

BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
3 RESEARCH PLACE
ROCKVILLE, MARYLAND 20850

and

BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA
4929 MAIN STREET
KANSAS CITY, MISSOURI 64112

and

HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION
1219 28th STREET, N. W.
WASHINGTON, D. C. 20007

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
1300 CONNECTICUT AVENUE, N. W.
SUITE 200
WASHINGTON, D. C. 20036

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS
570 NEW BROTHERHOOD BUILDING
KANSAS CITY, KANSAS 66101

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
10400 W. HIGGINS ROAD, SUITE 720
ROSEMONT, ILLINOIS 60018

and

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS
122 C STREET, N. W. SUITE 280
WASHINGTON, D. C. 20001

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
17 BATTERY PLACE, SUITE 1530
NEW YORK, NEW YORK 10004

and

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION
444 NORTH CAPITOL STREET, N. W.
SUITE 800
WASHINGTON, D. C. 20001

and

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA
99 MONTGOMERY STREET

JERSEY CITY, NEW JERSEY 07302 :
:
and :
:
SHEET METAL WORKERS :
INTERNATIONAL ASSOCIATION :
5111 S. 8th ROAD, BUILDING 1, :
APT. 208 :
ARLINGTON, VIRGINIA 22204 :
:
and :
:
TRANSPORT WORKERS UNION OF :
AMERICA :
80 WEST END AVENUE :
NEW YORK, NEW YORK 10023 :
:
and :
:
UNITED TRANSPORTATION UNION :
14600 DETROIT AVENUE :
CLEVELAND, OHIO 44107 :
:
PLAINTIFFS, :
:
v. :
:
CONSOLIDATED RAIL CORPORATION :
:
DEFENDANT. :

Plaintiffs for their Complaint against the defendant in this matter hereby allege as follows:

NATURE OF THE ACTION

1. This action for declaratory and injunctive relief seeks to have declared invalid actions taken and to be taken by defendant in violation of the Railway Labor Act,

as amended, 45 U.S.C. §151 *et seq.* and the Fourth Amendment of the United States Constitution.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331, 1337 and 2201. Venue of this Court is based upon 28 U.S.C. § 1391(c).

THE PARTIES

3. Plaintiff, Railway Labor Executives' Association (RLEA), is an unincorporated association whose membership consists of all the railway labor unions in the country which represent all crafts of railroad employees. The remaining plaintiffs, American Railway Supervisors' Assn., Division of BRAC; American Train Dispatchers' Assn.; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Brotherhood of Railway Carmen of the United States and Canada; Hotel Employees and Restaurant Employees International Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Longshoremen's Association; National Marine Engineers' Beneficial Assn.; Railroad Yardmasters of America; Seafarers' International Union of North America; Sheet Metal Workers' International Assn.; Transport Workers Union of America; and United Transportation Union are railway labor organizations and unincorporated associations representing various crafts of railroad workers in this country, consisting both of workers covered by the Hours of Service Act (45 U.S.C. 61 *et seq.*) and those not so covered. Plaintiffs United

Transportation Union, Brotherhood of Locomotive Engineers, Brotherhood of Railroad Signalmen, American Railway and Airway Supervisors Assn., Division of BRAC, and American Train Dispatchers' Association represent workers covered by the Hours of Service Act. Plaintiffs represent in collective bargaining all crafts of railroad workers, both covered and noncovered, employed on the defendant railroad, and are "representatives" of "employees" within the meaning of the Railway Labor Act, 45 U.S.C. §151. Plaintiffs bring this action on their own behalf and on behalf of their members and employees of defendant whom they represent.

4. Defendant Consolidated Rail Corporation (Conrail), was established by Act of Congress (45 U.S.C. § 741 *et seq.*) and is a corporation duly qualified to do business within the Commonwealth of Pennsylvania. Conrail is engaged in the interstate transportation of goods and commodities by rail in diverse states and is a carrier by railroad subject to Subtitle IV of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.,* the Railway Labor Act, 45 U.S.C. § 151 *et seq.* and the Hours of Service Act (45 U.S.C. § 61 *et seq.*). Defendant operates a line of railroad and is doing business within the Court's judicial district and maintains an office within this district.

COUNT I

5. Section 2, First of the Railway Labor Act, (45 U.S.C. § 152, First) requires parties subject to its provisions to make and maintain contracts covering the rates of pay, rules and working conditions of employees of a carrier by railroad, § 2, Second, requires that all disputes between a carrier and its employees be considered in conference between designated representatives and § 2, Seventh, (45 U.S.C. § 152 Seventh) prohibits any changes in the "rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements

except in the manner prescribed in such agreements or in § 6 of the Act." (45 U.S.C. § 156). That section requires referral of disputes to the Mediation Board before any change may be made in "agreements affecting rates of pay, rules or working conditions."

6. Since its establishment and at all times material herein, plaintiffs and Conrail have been parties to various collective bargaining agreements governing the rates of pay, rules and working conditions negotiated pursuant to the Railway Labor Act (45 U.S.C. § 61 *et seq.*) for the defendant's employees not covered by the Hours of Service Act and to various work practices which have become an integral and implicit part of such agreement though not set forth therein.

7. Throughout these years, the employees represented by plaintiffs have been required to comply with a Rule G promulgated by defendant which prohibits use of alcoholic beverages, intoxicants or narcotics by employees subject to duty, or their possession, use or being under the influence thereof while on duty or on railroad property. During these years surveillance of Rule G has been by sensory observation by security personnel.

8. On July 29, 1985, the Federal Railroad Administration (FRA) promulgated a Rule entitled Control of Alcohol and Drug Use (49 C.F.R. § 219, *et seq.*). The application of that Rule was limited to employees covered by the Hours of Service Act, and by its terms is not applicable to employees not subject to the Hours of Service Act.

9. Despite the fact that the Rule promulgated by FRA does not apply to employees not covered by the Hours of Service Act, nor authorizes testing of employees not covered by the Hours of Service Act, the defendant has subjected the non-covered employees to breathalyzer, urine and blood testing upon penalty of furlough or dismissal.

10. These actions by Conrail constitute a unilateral change in the major conditions of employment for

employees represented by plaintiffs' members not covered by the Hours of Service Act, which change or creation of a new rule where none existed is subject to the prior service of a notice upon plaintiffs and their constituent members pursuant to § 6 of the Railway Labor Act, 45 U.S.C. § 156. The required notice has not been given by Conrail to plaintiffs and their affected members.

11. Plaintiffs and their constituent members have protested the unilateral actions taken by the defendant and have attempted, without success, to negotiate on the subject matter of the unilaterally instituted toxicological testing program. Nonetheless, defendant has fully implemented its unilaterally promulgated surveillance program.

12. The actions and proposed actions of Conrail violate the rights of plaintiffs and the noncovered employees of Conrail which it represents as established and protected by § 2, First, Second and Seventh of the Railway Labor Act and constitute a violation of § 6 of the Act.

13. Unless the specified violations of the Railway Labor Act are enjoined and defendant Conrail is required to serve notice and bargain as specified by the Act prior to changing or creating new major conditions of employment, great and irreparable injury will be caused plaintiffs and the employees they represent and the public, which has an interest in securing compliance by railroad employers, as well as employees, with provisions of the Act.

14. Neither plaintiffs nor the employees represented by them have an adequate remedy to obtain good faith bargaining on the issues involved except from this Court or through the exercise of self-help.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that the Court:

A. Enter a judgment pursuant to 28 U.S.C. § 2201 declaring that the actions of Conrail in varying substantively and unilaterally the working conditions of their noncovered employees in the manner described herein violates §§ 1a and 2, First, Second and Seventh and Section 6 of the Railway Labor Act, (45 U.S.C. §§ 151a, 152, First, Second and Seventh and § 156) and that such actions and proposed actions are invalid and of no force and effect.

B. Enter such temporary and permanent injunctive relief as appears necessary and appropriate.

C. Grant plaintiffs their costs and reasonable attorney's fees and such other and further relief as may be equitable and proper.

COUNT II

15. Paragraphs 1-14 are realleged as if set forth herein in full.

16. Subpart C of the Regulation promulgated by the FRA (49 C.F.R. § 219.201 *et seq.*) imposes a mandatory obligation upon defendant to subject covered employees to blood and urine testing in the event of a major train accident, an impact accident or a fatal train incident. In disregard of these limitations of the events for which blood and urine testing is authorized, defendant has subjected and continues to subject all employees, both those covered by the Hours of Service Act and those not so covered, to toxicological testing upon return to work from furlough, for nonservice related illness or injury and for other situations and events not specified in the Regulation.

17. Subpart D of the FRA Regulation (49 C.F.R. § 219.301 *et seq.*) authorizes, but does not require,

defendant to administer breath and urine testing to covered employees in other accidents or incidents than those specified in Subpart C, in case of a certain specified rule violation, or upon reasonable suspicion based upon specific, personal observations by a supervisory employee concerning the appearance, behavior, speech or body odors of the employee. Urine testing, however, is authorized only by observation of at least two supervisory employees and, if the testing is based upon suspicion that the employee is under the influence of a controlled substance, at least one of each supervisory employee must have received three hours of training to detect signs of drug intoxication. In disregard for these limitations defendant has subjected and continues to subject all employees, both those covered by the Hours of Service Act and those not so covered, to both breath and urine testing without complying with the specified standards relating to supervisory employees.

18. Moreover, said employees are being held out of service pending the result of the drug screen, to their financial detriment.

19. These unilateral actions by Conrail constitute a major change in the conditions of employment for both covered and noncovered employees represented by plaintiffs. This change or creation of a new rule where none existed is subject to the prior service of a notice upon plaintiffs and their constituent members pursuant to § 6 of the Railway Labor Act, 45 U.S.C. § 156. The required notice has not been given by Conrail to plaintiffs and their affected members.

20. Plaintiffs and their constituent members have protested the unilateral actions taken by the defendant and have attempted, without success, to negotiate on the subject matter of the unilaterally instituted toxicological testing program. Nonetheless, defendant has fully implemented its unilaterally promulgated surveillance program.

21. These actions and proposed actions of Conrail in testing employees covered by the Hours of Service Act, as well as those not covered, violate the rights of plaintiffs and the covered and noncovered employees of Conrail which they represent as established and protected by § 2, First, Second and Seventh of the Railway Labor Act and constitute a violation of § 6 of the Act.

22. Unless the specified violations of the Railway Labor Act are enjoined and defendant Conrail is required to serve notice and bargain as specified by the Act prior to changing or creating new major conditions of employment, great and irreparable injury will be caused plaintiffs and the employees they represent and the public, which has an interest in securing compliance by railroad employers, as well as employees, with provisions of the Act.

23. Neither plaintiffs nor the employees represented by them have an adequate remedy to obtain good faith bargaining on the issues involved except from this Court or through the exercise of self-help.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that the Court:

A. Enter a judgment pursuant to 28 U.S.C. § 2201 declaring that the actions of Conrail in varying substantively and unilaterally the working conditions of their **noncovered employees** in the manner described herein violate §§ 1a and 2, First, Second and Seventh and Section 6 of the Railway Labor Act, (45 U.S.C §§ 151a, 152, First, Second and Seventh and § 156) and that such actions and proposed actions are invalid and of no force and effect.

B. Enter such temporary and permanent injunctive relief as appears necessary and appropriate.

C. Grant plaintiffs their costs and reasonable attorney's fees and such other and further relief as may be equitable and proper.

COUNT III

24. Paragraphs 1 through 22 are realleged as if set forth herein in full.

25. Conrail was established by Act of Congress (45 U.S.C. § 741 *et seq.*) to provide a rail service system in the mid-west and northeast region of the country adequate to meet the needs and service requirements of that region and of the national transportation system. It is controlled by and largely financed by the Federal government. In this circumstance, the administration of toxicological testing by Conrail of its employees, both those covered by the Hours of Service Act and those not covered, constitutes federal action subject to the constitutional restrictions of the Fourth Amendment of the U. S. Constitution. The toxicological testing, which is being conducted without probable cause or reasonable suspicion violates, the Fourth Amendment.

WHEREFORE, plaintiffs pray that the Court:

A. Enter a judgment pursuant to 28 U.S.C. § 2201 declaring that the toxicological testing of Conrail of its employees, both those covered by the Hours of Service Act and those not covered, is subject to the provisions of the Fourth Amendment and that the toxicological testing program violates the applicable constitutional prohibitions of the Fourth Amendment.

B. Enter such temporary and permanent injunctive relief as appears necessary and appropriate.

C. Grant plaintiffs their cost and reasonable attorneys' fees and such other and further relief as may be equitable and proper.

Respectfully submitted,

ALPER, MANN & REISER

/s/ Lawrence M. Mann
LAWRENCE M. MANN

/s/ Jerome M. Alper
JEROME M. ALPER

/s/ Deborah E. Reiser
DEBORAH E. REISER
SUITE 811
400 FIRST STREET, N.W.
WASHINGTON, D. C. 20001
(202) 298-9191
Attorneys for Plaintiffs

/s/ Cornelius O'Brien
CORNELIUS O'BRIEN, Esquire
3608 CENTRE SQUARE WEST
1500 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19102
(215) 568-4343

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION
400 FIRST STREET, N. W.
WASHINGTON, D.C. 20001

and

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSN., DIVISION OF BRAC
3 RESEARCH PLACE
ROCKVILLE, MARYLAND 20850

and

AMERICAN TRAIN DISPATCHERS ASSOCIATION
1401 S. HARLEM AVENUE
BERWYN, ILLINOIS 60402

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1112 B OF LE BUILDING
1365 ONTARIO AVENUE
CLEVELAND, OHIO 44114

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
12050 WOODWARD AVENUE
DETROIT, MICHIGAN 48203

and

CIVIL ACTION NO.
86-2698

ANSWER

BROTHERHOOD OF RAILROAD SIGNALMEN
601 WEST GOLF ROAD
MT. PROSPECT, ILLINOIS 60056

and

BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
3 RESEARCH PLACE
ROCKVILLE, MARYLAND 20850

and

BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA
4929 MAIN STREET
KANSAS CITY, MISSOURI 64112

and

HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION
1219 28th STREET, N. W.
WASHINGTON, D.C. 20007

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
1300 CONNECTICUT AVENUE, N. W.
SUITE 200
WASHINGTON, D.C. 20036

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS
570 NEW BROTHERHOOD BUILDING
KANSAS CITY, KANSAS 66101

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
10400 W. HIGGINS ROAD, SUITE 720
ROSEMONT, ILLINOIS 60018

and

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS
122 C STREET, N.W., SUITE 280
WASHINGTON, D.C. 20001

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
17 BATTERY PLACE, SUITE 1530
NEW YORK, NEW YORK 10004

and

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION
444 NORTH CAPITOL STREET, N.W.
SUITE 800
WASHINGTON, D.C. 20001

and

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA
99 MONTGOMERY STREET

JERSEY CITY, NEW JERSEY 07302

and

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION
5111 S. 8th ROAD, BUILDING 1, APT. 208
ARLINGTON, VIRGINIA 22204

and

TRANSPORT WORKERS UNION OF AMERICA
80 WEST END AVENUE
NEW YORK, NEW YORK 10023

and

UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND, OHIO 44107

PLAINTIFFS,

v.

CONSOLIDATED RAIL CORPORATION

DEFENDANT.

Defendant, CONSOLIDATED RAIL CORPORATION ("Conrail"), by and through counsel, hereby answers the Complaint in this action, according to the numbered paragraphs thereof, as follows.

NATURE OF ACTION

1. It is admitted that Plaintiffs seek to bring an action for declaratory and injunctive relief under the

Railway Labor Act, as amended, and the Fourth Amendment of the United States Constitution, however, for the reasons set forth below, Defendant denies that any of its actions taken were in violation of either the statute or the Fourth Amendment.

JURISDICTION AND VENUE

2. It is admitted that Plaintiffs seek to invoke the jurisdiction of this Court in the manner alleged in Paragraph 1 of the Complaint, however, Defendant denies that this Court has jurisdiction for the reasons set forth below.

THE PARTIES

3. Defendant is without information or knowledge to affirm or deny the allegations regarding the constituency of the Railway Labor Executives' Association ("RLEA"). It is admitted that Plaintiffs are railway labor organizations representing various crafts of railroad workers in this country, including workers both covered and not covered by the Hours of Service Act, however, Defendant is without information or knowledge as to the corporate status of these organizations. It is denied that the Hotel Employees & Restaurant Employees International Union, the National Marine Engineers' Beneficial Association, or Seafarers' International Union of North America represent in collective bargaining any crafts of railroad workers employed by the Defendant. It is admitted that the remaining Plaintiffs represent in collective bargaining crafts of railroad workers, both covered and not covered by the Hours of Service Act, and are "representatives" of "employees" of Defendant within the meaning of the Railway Labor Act. It is admitted that among the workers represented by the United Transportation Union, Brotherhood of Locomotive Engineers, Brotherhood of Railroad Signalmen, the American Railway and Airways Supervisors Association, Division of

BRAC, and the American Train Dispatchers' Association are workers covered by the Hours of Service Act. Defendant is without information or knowledge to affirm or deny the remaining allegations of Paragraph 3 of the Complaint.

4. The allegations of Paragraph 4 of the Complaint are admitted.

COUNT I

5. Paragraph 5 is a conclusion of law, to which no response is necessary. To the extent a response is deemed necessary, it is denied.

6. It is admitted that Plaintiffs, (other than the Hotel Employees & Restaurant Employees International Union, National Marine Engineers' Beneficial Association and Seafarers' International Union) and Conrail are parties to various collective bargaining agreements governing the rates of pay, rules and working conditions negotiated pursuant to the Railway Labor Act for the Defendants' employees not covered by the Hours of Service Act, and that Defendant has from time to time established and enforced various work practices not set forth in collective bargaining agreements. Defendant denies the remaining allegations of paragraph No. 6.

7. It is admitted that some of Defendant's employees represented by some of the Plaintiffs have been required to comply with Rule G promulgated by Defendant. The provisions of Rule G speak for themselves, rendering unnecessary a response to Paragraph 7's interpretation of Rule G. Defendant denies the remaining allegations of Paragraph 7.

8. It is admitted that the Federal Railroad Administration promulgated a rule entitled Control of Alcohol and Drug Use, 49 C.F.R. Part 219, however, it is denied that said rule was promulgated on July 29, 1985. The

remainder of the allegations in Paragraph 8 are conclusions of law, to which no response is necessary. To the extent responses are deemed necessary, they are denied.

9. To the extent that Paragraph 9 states a conclusion of law, no response is necessary, however, to the extent a response is deemed necessary, it is denied. The remaining allegations of Paragraph 9 are denied.

10. - 14. The allegations of Complaint Paragraph 10 through 14 inclusive are denied.

COUNT II

15. Defendant's responses to Complaint Paragraphs 1 through 14, inclusive are incorporated herein by reference.

16. The allegations in the first sentence of Paragraph 16 are conclusions of law, to which no response is necessary; to the extent responses are deemed necessary, they are denied. The remaining allegations of Paragraph 16 of the Complaint are denied.

17. Sentences 1 and 2 of Complaint Paragraph 17 are conclusions of law, to which no response is necessary; to the extent responses are deemed necessary, they are denied. The remaining allegations of Paragraph 17 of the Complaint are denied.

18. The allegations of Paragraph 18 of the Complaint are denied.

19. - 23. The allegations of Complaint Paragraphs 19 through 23, inclusive are denied.

COUNT III

24. Defendant's responses to Paragraphs 1 through 22, inclusive are incorporated herein by reference.

25. It is admitted that Conrail was established by Act of Congress (45 U.S.C. § 741, *et seq.*). The remainder of the first sentence of Paragraph 25 is a conclusion of law to which no response is deemed necessary; to the extent

a response is deemed necessary, it is denied. The remaining allegations of Paragraph 25 are denied.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Court is barred by the statute of limitations from considering actions complaining of conduct occurring more than six months prior to the filing and service of the Complaint.

THIRD AFFIRMATIVE DEFENSE

The Court is without jurisdiction under the Railway Labor Act over this action because the disputes alleged are "minor disputes" under the Railway Labor Act, Section 2(Fifth) 45 U.S.C. §152(a)(Fifth), and therefore are within the exclusive jurisdiction of the Railway Labor Act's grievance procedures.

FOURTH AFFIRMATIVE DEFENSE

Conrail is a private employer and is, by law, not an agency or instrumentality of the federal government. Thus, the Plaintiff's allegations do not give rise to a cause of action under the Fourth Amendment to the U.S. Constitution.

FIFTH AFFIRMATIVE DEFENSE

Defendant's past practice of establishing and changing both medical criteria and medical testing to assess employees' medical qualifications for work has been acquiesced in by the Plaintiffs and, therefore, is part of the established working conditions for Defendant's employees. Any dispute as to such practice is a minor

dispute. In the alternative there has been no change in the working conditions of employees represented by Plaintiffs.

SIXTH AFFIRMATIVE DEFENSE

The Court is without jurisdiction to grant injunctive relief or damages concerning "minor disputes" until such dispute has been fully processed and disposed of in accordance with the grievance procedure established by the Railway Labor Act, §§ 2 and 3, 45 U.S.C. §§ 152, 153. Plaintiffs cannot establish the irreparable harm requirement for the issuance of injunctive relief in that the traditional remedies available before the Adjustment Boards are fully adequate to compensate employees subjected to improper toxological [toxicological] testing.

Respectfully submitted,

/s/ Hermon M. Wells
Hermon M. Wells, Esquire
Consolidated Rail Corporation
Six Penn Center Plaza
Philadelphia, PA 19183-2959
(215) 977-5019

/s/ Dennis J. Morikawa
Dennis J. Morikawa, Esquire
Morgan, Lewis & Bockius
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5513

/s/ Anita W. Schoomaker
Anita W. Schoomaker, Esquire
Morgan, Lewis & Bockius
1800 M Street, N.W.
Suite 800 – North
Washington, D.C. 20036
(202) 872-5084

OF COUNSEL

MORGAN, LEWIS & BOCKIUS
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5000

CERTIFICATE OF SERVICE

I, Dennis J. Morikawa, hereby certify that copies of the within Answer were served on opposing counsel by mailing copies thereof by first class mail, postage pre-paid to the following addresses:

Lawrence M. Mann, Esquire
Alper, Mann & Reiser
Suite 811
400 First Street, N.W.
Washington, DC 20001

Jerome M. Alper, Esquire
Alper, Mann & Reiser
Suite 811
400 First Street, N.W.
Washington, DC 20001

Deborah E. Reiser, Esquire
Alper, Mann & Reiser
Suite 811
400 First Street, N.W.
Washington, DC 20001

Cornelius O'Brien, Esquire
3608 Centre Square West
1500 Market Street
Philadelphia, PA 19102

/s/ Dennis J. Morikawa
Dennis J. Morikawa

Dated: May 28, 1986

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION 400 FIRST STREET, N. W. WASHINGTON, D. C. 20001	:	
and	:	
AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSN., DIVISION OF BRAC 3 RESEARCH PLACE ROCKVILLE, MARYLAND 20850	:	
and	:	CIVIL ACTION NO. 86-2698
AMERICAN TRAIN DISPATCHERS ASSOCIATION 1401 S. HARLEM AVENUE BERWYN, ILLINOIS 60402	:	DEFENDANT CONSOLIDATED RAIL CORPORATION'S ANSWERS AND OBJECTIONS TO PLAINTIFFS' INTERROGATORIES
and	:	
BROTHERHOOD OF LOCOMOTIVE ENGINEERS 1112 B OF LE BUILDING 1365 ONTARIO AVENUE CLEVELAND, OHIO 44114	:	
and	:	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES 12050 WOODWARD AVENUE DETROIT, MICHIGAN 48203	:	
and	:	

BROTHERHOOD OF RAILROAD SIGNALMEN
601 WEST GOLF ROAD
MT. PROSPECT, ILLINOIS 60056

and

BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
3 RESEARCH PLACE
ROCKVILLE, MARYLAND 20850

and

BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA
4929 MAIN STREET
KANSAS CITY, MISSOURI 64112

and

HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION
1219 28th STREET, N. W.
WASHINGTON, D. C. 20007

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
1300 CONNECTICUT AVENUE, N. W.
SUITE 200
WASHINGTON, D. C. 20036

and

INTERNATIONAL BROTHERHOOD OF BOILER-MAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS
570 NEW BROTHERHOOD BUILDING
KANSAS CITY, KANSAS 66101

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
10400 W. HIGGINS ROAD, SUITE 720
ROSEMONT, ILLINOIS 60018

and

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS
122 C STREET, N. W., SUITE 280
WASHINGTON, D. C. 20001

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
17 BATTERY PLACE, SUITE 1530
NEW YORK, NEW YORK 10004

and

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION
444 NORTH CAPITAL,
SUITE 800
WASHINGTON, D. C. 20001

and

SEAFARERS' INTERNATIONAL UNION NORTH AMERICA
99 MONTGOMERY STREET

JERSEY CITY, NEW JERSEY 07302 :
:
and :
:
SHEET METAL WORKERS :
INTERNATIONAL ASSOCIATION :
5111 S. 8th ROAD, BUILDING 1, :
APT. 208 :
ARLINGTON, VIRGINIA 22204 :
:
and :
:
TRANSPORT WORKERS UNION OF :
AMERICA :
80 WEST END AVENUE :
NEW YORK, NEW YORK 10023 :
:
and :
:
UNITED TRANSPORTATION UNION :
14600 DETROIT AVENUE :
CLEVELAND, OHIO 44107 :
:
PLAINTIFFS, :
:
v. :
:
CONSOLIDATED RAIL CORPORATION :
:
DEFENDANT. :

DEFENDANT CONSOLIDATED RAIL CORPORATION'S ANSWERS AND OBJECTIONS TO PLAINTIFFS' INTERROGATORIES

Defendant Consolidated Rail Corporation (hereinafter "Conrail"), hereby objects to certain of Plaintiffs' Interrogatories and hereby responds to certain of Plaintiffs' Interrogatories in accordance with the numbered paragraphs thereof as set forth below. The answers set

forth below are submitted subject to the objections contained herein and without waiving any of those objections.

The information set forth below is based upon Conrail's current knowledge of the facts of this matter and its investigation to date. That investigation is continuing and Conrail reserves the right to amend, supplement or modify these answers as may be necessary or appropriate in the future.

INTERROGATORIES, ANSWERS AND OBJECTIONS

1. When did defendant first initiate urinalysis tests for alcohol and/or drugs?

ANSWER: Conrail, through its physicians, has conducted urine testing of its employees for drugs/alcohol since at least 1978.

2. Did such testing apply both to employees covered by the Hours of Service act and those not covered?

ANSWER: Yes.

3. State the employee crafts which are subject to the testing.

ANSWER: Conrail has conducted urine testing of all employees of all crafts.

4. Did defendant notify the affected employees of the institution of the testing when defendant first initiated urinalysis tests for alcohol and/or drugs? If so, identify the notice, give the date of the notice and state the manner in which notice was given.

ANSWER: Conrail contends that no notice was required. However, employees whose urine was tested for the presence of drugs/alcohol were always told before they provided a urine specimen that such testing would be conducted.

5. With respect to the employee crafts which were subject to the first program for toxicological testing of urine, state the occasions, circumstances, and/or incidents for which such testing was required.

ANSWER: Conrail objects to Interrogatory No. 5 on the grounds that the term "first program" refers to urine testing for drugs/alcohol that took place in 1978, such testing was conducted at the discretion of the examining physician.

6. Is toxicological testing of urine required for any employee crafts other than those identified above? If so, identify the employee crafts made subject to such testing and state when the requirement was imposed for each such craft.

ANSWER: See response to Interrogatory No. 3.

7. With respect to each employee craft identified in Question 6, state the occasions, circumstances and/or incidents for which such testing was required.

ANSWER: To the extent Interrogatory No. 7 refers to the time period prior to 1984, see response to Interrogatory No. 5. In 1984, Conrail promulgated its Medical Standards Manual, relevant portions of which are attached hereto as Attachment 1, and for a six-month period, tested some employees pursuant to the provisions contained therein. Currently, Conrail tests employees of all crafts under the following circumstances: (1) as part of a pre-employment physical examination; (2) at the discretion of the examining physician as part of a return-to-duty or periodic physical examination; and (3) when an employee voluntarily agrees to undergo such testing. In addition, Conrail conducts post-accident testing of employees covered by the Hours of Service Act, as required by the regulations recently promulgated by the Federal Railroad Administration, at 49 C.F.R. §219 *et seq.*

8. With respect to each employee craft identified in Question 6, state whether defendant notified the affected employees of the institution of such testing and, if so, give the date of the notice, the form of the notice and state the manner in which the notice was given.

ANSWER: See response to Interrogatory No. 4. In addition, in October, 1985, Conrail posted a notice, attached hereto as Attachment 2, announcing the rules promulgated by the Federal Railroad Administration at 49 C.F.R. §219 *et seq.* Moreover, in February, 1986, Conrail sent a pamphlet to all employees, attached hereto as Attachment 3, which also announced the rules promulgated by the Federal Railroad Administration at 49 C.F.R. §219 *et seq.*

9. Does defendant require periodic physical examinations of employees? If so, identify the crafts subject to periodic physical examinations and state when such examinations were first required for each employee craft.

ANSWER: Yes. Conrail has required periodic physical examinations of employees since its inception in 1976. The crafts for which such examinations are required are set forth on p. 12 of Conrail's Medical Standards Manual, attached hereto as Attachment 1. Upon information and belief, Conrail's predecessor railroads also required periodic physical examinations of employees of all crafts. Conrail is without knowledge or information sufficient to form a belief as to when its predecessor railroads first required periodic physical examinations of employees.

10. State when toxicological testing of urine was first required for each employee craft as part of the periodic physical examination.

ANSWER: Since at least 1978, Conrail's physicians have required certain employees to undergo urine testing for drugs/alcohol as part of their periodic physical examination. Conrail is without knowledge or information sufficient to form a belief as to when its predecessor railroads first conducted urine testing for drugs/alcohol as part of a periodic physical examination.

11. Were employees notified of the addition of the testing of urine for alcohol and/or drugs as part of the periodic physical examination? If so, identify the employee crafts to which any notice was given, the form of the notice given to each craft, the date of

each such notice and the manner in which the notice was given.

ANSWER: See response to Interrogatory No. 4.

12. How frequently are periodic physical examinations given? If the frequency varies as to crafts and/or to age [sic].

ANSWER: Periodic physical examinations are currently conducted every three years up to and including age 50 and every two years thereafter, with exceptions as noted on page 12 of the Medical Standards Manual, attached hereto as Attachment 1.

13. Has there been any change in the frequency of the periodic physical examinations for any craft? If so, state when such change was made.

ANSWER: There has been no change in the frequency of periodic physical examinations since the Medical Standards Manual was issued on April 1, 1984.

14. Does the defendant require a physical examination of employees upon return to duty?

ANSWER: Yes.

15. If your answer to the previous question is affirmative, identify the employee crafts subject to physical examinations upon return to duty and state when such examinations were first required for each employee craft.

ANSWER: Conrail has required physical examinations upon return to duty for employees of all crafts since its inception in 1976. Conrail is without knowledge or information sufficient to form a belief as to when its predecessor railroads first required physical examinations for employees upon their return to duty.

16. State when toxicological testing of urine was first required for each employee craft as part of return to duty physical examination.

ANSWER: Conrail is without knowledge or information sufficient to form a belief as to when urine testing was first required for employees of its predecessor railroads as part of a physical examination upon return to duty.

Since at least 1978, Conrail's physicians have required some employees to undergo urine testing upon return to duty.

17. Is the requirement for physical examinations dependent upon a specific minimum time of absence of duty? If so, state the time requirement and whether the time requirement varies with the cause of the absence from duty or with the employee's craft and provide the relevant time factors.

ANSWER: Yes. See pp. 15-17 of the Medical Standards Manual, attached hereto as Attachment 1.

18. Were employees notified that the testing of urine samples for alcohol and/or drugs would be done routinely as part of all return to work physical examinations? If so, identify the employee crafts to which any notice was given, the form of the notice given to each craft, the date of each such notice and the manner in which the notice was given.

ANSWER: See response to Interrogatory No. 4.

19. Has the defendant in the past, or does the defendant now, subject employees to blood testing of alcohol and drugs? If so, provide information a) as to when such testing was initiated for each employee craft subject to such testing, b) the occasions, circumstances and/or incidence for which such testing was and/or is required and c) the date, form and manner of given notice to affected employees of the institution of such testing.

ANSWER: Yes.

a) Since Conrail's inception in 1976, Conrail's physicians and supervisors have asked certain employees to voluntarily undergo blood testing. Upon information and belief, Conrail's predecessor railroads also asked employees to voluntarily undergo blood testing. Conrail is without knowledge or information sufficient to form a belief as to when its predecessor railroads first asked employees to undergo blood testing.

b) Conrail currently requires employees to undergo blood testing as set forth in the regulations recently promulgated by the Federal Railroad Administration at 49 C.F.R. §219 *et seq.* Since Conrail's inception in 1976, Conrail's physicians have asked employees to voluntarily undergo blood testing, when in the physician's judgment, such testing was warranted. Upon information and belief, Conrail's predecessor railroads also occasionally asked employees to voluntarily undergo blood testing when, in the physician's judgment, such testing was warranted.

c) See response to Interrogatory No. 4. Conrail has notified all employees of its intention to utilize blood testing as required by the recent regulations promulgated by the Federal Railroad Administration at 49 C.F.R. §219 *et seq.* Copies of these notifications are attached hereto as Attachments 2 and 3.

20. State the permissible level for alcohol in urine and blood and the permissible level for each of the various drugs for which urine and blood are tested.

ANSWER: Conrail has not established any "permissible levels" for alcohol or drugs in the urine or blood.

21. Does defendant have a General Rule or Rules relating to use of alcohol and drugs by employees? If so identify the Rule or Rules and, if separate Rules apply to employees covered by the Hours of Service Act and those not covered, identify the Rules applicable to each such category.

ANSWER: Yes. Rule G, which applies to all employees in Conrail's Transportation department, states:

> The use of intoxicants, narcotics, amphetamines, or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties.

In addition, Conrail has promulgated Safety Rules, which apply to various groups of employees and which include regulations relating to the use of drugs and/or alcohol. Copies of these rules are attached thereto as Attachments 4-10.

22. When was the Rule or Rules presently in effect instituted relating to use of alcohol and drugs by employees covered by the Hours of Service Act and employees not covered?

ANSWER: Conrail is without knowledge or information sufficient to form a belief as to the exact date when Rule G and the Safety Rules referred to in its response to Interrogatory No. 21 were instituted. Both Rule G and the Safety Rules have been in effect since at least the time of Conrail's inception in 1976.

23. Was notice of the adoption of the Rule or Rules presently in effect given to employees and, if so, indicate the form and manner of providing the notice and when such notice was given.

ANSWER: Conrail is without knowledge or information sufficient to form a belief as to whether employees were given notice of the adoption of Rule G and the Safety Rules referred to in Interrogatory No. 21. However, all employees of Conrail's Transportation Department are given copies of the booklet containing Rule G when they are initially hired. In addition, all employees who work in the areas for which Safety Rules relating to the use of drugs and alcohol have been promulgated are given booklets containing these rules when they are initially hired, as well as on each occasion when the rules are revised.

/s/ Joseph J. Costello
DENNIS J. MORIKAWA
JOSEPH J. COSTELLO
2000 One Logan Square
Philadelphia, PA 19103

Of Counsel:

MORGAN, LEWIS & BOCKIUS

HERMON M. WELLS
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19104-2959

Attorneys for Defendant
Consolidated Rail Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answers and Objections to Plaintiffs' Interrogatories to Defendant was served upon counsel for the Plaintiffs by first class mail, postage prepaid at the following address: Jerome M. Alper, Esq., Alper, Mann & Reiser, Suite 811, 400 First Street, N.W., Washington, D.C. 20001.

DATED: 9/23/86

/s/ Joseph J. Costello
JOSEPH J. COSTELLO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,	:	
PLAINTIFFS,	:	
v.	:	CIVIL ACTION NO. 86-2698
CONSOLIDATED RAIL CORPORATION,	:	
DEFENDANT.	:	

PLAINTIFFS' ANSWERS AND OBJECTIONS
TO DEFENDANT'S INTERROGATORIES

Plaintiffs hereby object to certain of Defendant's Interrogatories and hereby respond to certain of Defendant's Interrogatories in accordance with the numbered paragraphs thereof set forth below. The answers set forth below are submitted subject to the objections contained herein and without waiving any of those objections.

The information set forth below is based upon Plaintiffs' current knowledge of the facts of this matter and its investigation to date. That investigation is continuing and plaintiffs reserve the right to amend, supplement or modify these answers as may be necessary or appropriate in the future.

INTERROGATORIES, ANSWERS AND OBJECTIONS

1. Identify all correspondence between Plaintiffs' officials and Conrail that refers or relates in any way to drug and/or alcohol testing of employees.

ANSWER: Plaintiffs object to Interrogatory No. 1 for the following reasons:

a. The information requested is necessarily in the possession of the defendant and the development of the requested information by plaintiffs would be duplicative and would not provide defendant with any information not already available to it.

b. The development of the requested information by plaintiffs would be necessarily burdensome. The 18 National Union Organizations which are plaintiffs have in the aggregate several hundred Local Chairmen who represent the 20,000 or so employees of defendant who are members of the Plaintiff Organizations and handle the day-to-day relations between those members and the defendant.

c. The information requested is not relevant nor calculated to lead to the discovery of admissible evidence. the dispositive issue is whether the unilateral imposition by Defendant of urine testing for alcohol and drugs as part of in-service periodic medical examinations and medical examinations required upon return to service from furlough or illness constitutes a change in working conditions subject to section 6 of the Railway Labor Act, 45 U.S.C. 156, and if so, whether the notice and other procedures specified in that section were complied with. The information sought has no relevance to these dispositive issues.

d. The information sought is not material. In its Answers to the Interrogatories propounded by Plaintiffs, Defendant has admitted that in 1984 it unilaterally instituted toxicological testing of urine for alcohol and drugs for employees of all crafts as part of return-to-duty and periodic physical examinations (Answer to Interrogatory 7) and that no prior notice was given for the required toxicological testing of non-covered employees and for the toxicological testing of both covered and

non-covered employees as part of return-to-duty and periodic medical examinations. (Answers to Interrogatories 4 and 7).

2. Identify any conversation(s) between Plaintiffs' officials and any employee(s) or representative(s) of Conrail concerning drug and/or alcohol testing of employees.

ANSWER: See Answer to Interrogatory 1.

3. Identify any documents, including, but not limited to, internal union memoranda or correspondence, that refer or relate in any way to drug and/or alcohol testing of Conrail employees.

ANSWER: See paragraphs b, c and d of Answer to Interrogatory 1.

4. Identify all grievances or "minor disputes" filed by Plaintiffs' officials or any past or current Conrail employee challenging Conrail's right to conduct drug and/or alcohol testing of employees.

ANSWER: See Answer to Interrogatory 1.

5. Identify all correspondence between Plaintiffs' officials and Conrail that refers or relates in any way to Conrail's medical examinations of employees.

ANSWER: See Answer to Interrogatory 1.

6. Identify any conversations between Plaintiffs' officials and employee(s) or representative(s) of Conrail concerning Conrail's medical examinations of employees.

ANSWER: See Answer to Interrogatory 1.

7. Identify any documents, including, but not limited to, internal union memoranda or correspondence, that refer or relate in any way to Conrail's medical examinations of employees.

ANSWER: See paragraphs b, c and d of Answer to Interrogatory 1.

8. Identify all grievances or "minor disputes" filed by Plaintiff's officials or any past or current Conrail employee challenging Conrail's medical examination procedures.

ANSWER: See Answer to Interrogatory 1.

9. Identify all grievances or "minor disputes" filed by Plaintiff's officials or any past or current Conrail employee challenging disciplinary measures taken by Conrail based, in whole or in part, on the results of drug and/or alcohol testing.

ANSWER: See Answer to Interrogatory 1.

10. With respect to paragraph 7 of Plaintiffs' Complaint, set forth the factual basis for the allegation that "surveillance of Rule G has been by sensory observation by security personnel."

ANSWER: Donald Swanson, Vice President – Transportation of the Consolidated Rail Corporation testified in the rulemaking proceedings before the Federal Railroad Administration on Control of Alcohol and Drug Use, Docket No. RSOR-6 in September 1983, that "regular, company-wide – but not personally intrusive – supervisory observations of operating employees have long been standard practice for Conrail and have proven highly beneficial." At p. 174 (Attachment 1). Mr. Swanson further testified that "I don't think there should be a day go by probably that the employees are not observed in some fashion." At p. 180 (Attachment 1). A letter from R. E. Sweart, Vice President, Labor Relations, to John F. Sytsma, dated November 17, 1983, states "Our experience . . . indicates that supervisory personnel and employee representatives acquire the capability to identify behavior which may be caused by alcohol and drug use. . . ." (Attachment 2).

11. With respect to paragraph 9 of Plaintiffs' Complaint, set forth the factual basis for the allegation that "the defendant has subjected the non-covered employees to breath analysis, urine, and blood testing upon penalty of furlough or dismissal."

ANSWER: In the rulemaking hearings referred to in Answer to Interrogatory 10, Mr. Swanson testified that "Under the Conrail program, once an employee is determined to have violated Rule G, he or she must be

disciplined . . . it is our experience that discipline – removal from service and other financial penalty and potential reinstatement – is essential in prompting employees to solve their performance problems and to get help. At p. 176 (Attachment 1).

12. With respect to paragraphs 10 and 19 of the Plaintiffs' Complaint, set forth the factual basis for the allegation that Conrail "creat[ed] a new rule where none existed. . . ."

ANSWER: Prior to April 1, 1984, enforcement of Rule G was by sensory observation by supervisory personnel. Effective April 1, 1984, Conrail instituted the requirement for all employees for toxicological testing of urine for alcohol and drugs in the periodic physical examination and in the physical examinations for return from furlough, leave, suspicion or similar causes. The inclusion of drug screening of urine as part of physical examinations constitutes a new rule affecting working conditions.

13. With respect to paragraphs 11 and 20 of Plaintiffs' Complaint, identify the individuals who "have protested" and "attempted, without success, to negotiate on the subject matter of the unilaterally instituted toxicological testing program". Identify any conversations or documents which set forth the substance of Plaintiffs' purported protests and attempts to negotiate.

ANSWER: Since the testing program was unilaterally instituted without notice by the carrier as required by 45 U.S.C. 156, there was no opportunity for plaintiff to protest prior to the effective date of the change in working conditions. Plaintiffs' have no information at this time on the identity of the individuals who protested or sought to negotiate with respect to the unilaterally instituted toxicological testing program.

14. With respect to paragraph 16 of Plaintiff's Complaint, set forth the factual basis for the allegation that Conrail "[i]n disregard of these limitations of the events for which blood and urine testing is authorized

. . . has subjected and continues to subject all employees, both those covered by the Hours of Service Act and those not so covered, to toxicological testing upon return to work from furlough, for non-service related illness or injury and for other situations and events not specified in the Regulation."

ANSWER: See Answer to Interrogatory 12.

15. With respect to paragraph 17 of Plaintiffs' Complaint, set forth the factual basis for the allegation that Conrail, "[i]n disregard for these 1 mitations . . . has subjected and continues to subject all employees, both those covered by the Hours of Service Act and those not so covered, to both breath and urine testing without complying with the specified standards relating to supervisory employees."

ANSWER: Defendant does not limit urine testing for alcohol and drugs to reasonable suspicion based on specific, personal observations by supervisory employees, but without reasonable suspicion subjects employees to toxicological testing of urine in regular periodic and return to work physical examinations.

16. With respect to paragraph 18 of Plaintiffs' Complaint, set forth the factual basis for the allegation that "said employees are being held out of service pending the result of the drug screen, to their financial detriment."

ANSWER: Mr. Swanson testified at the Federal Railroad Administration rulemaking proceedings that "it is our experience that discipline, removal from service or other financial penalty and potential reinstatement – is essential in prompting employees to solve their performance problems and to get help." At p. 176 (Attachment 1).

By letter dated May 22, 1986, from M. J. Maloof, General Chairman, General Committee of Adjustment, United Transportation Union, to K. F. Schwab, Senior Director, Labor Relations, for defendant, it was reported

that Trainman L. Bernard was held out of service pending results of a physical examination. (Attachment 3).

17. Identify each and every exhibit and document that you have reason to believe you may use in the prosecution of this lawsuit.

ANSWER: Plaintiff refuses to identify the requested documents on the grounds that they are covered by the lawyer-client privilege and the work product exemption.

ALPER, MANN & REISER

BY /s/ Jerome M. Alper
JEROME M. ALPER
SUITE 811
400 FIRST STREET, N. W.
WASHINGTON, D. C. 20001
(202) 298-9191

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 1986, a copy of the foregoing Answers and Objections to Defendant's Interrogatories was mailed, postage prepaid, to:

Dennis J. Morikawa, Esquire
Joseph J. Costello, Esquire
2000 One Logan Square
Philadelphia, Pennsylvania 19103

Hermon M. Wells, Esquire
Consolidated Rail Corporation
Six Penn Center Plaza
Philadelphia, Pennsylvania 19183-2959

/s/ Jerome M. Alper
JEROME M. ALPER

ATTACHMENT 1

• • •

Option III, which recommends establishing criteria for supervisory observations, would tackle the problem of drug and alcohol use with prevention as the objective.

Regular, company-wide — but not personally intrusive — supervisory observations of operating employees have long been standard practice for Conrail and have proven highly beneficial.

They are observations of safety performance and of proficiency as well as fitness for work.

The effectiveness of these observations is being markedly strengthened by the Management Awareness Program which I previously mentioned. Conrail's managers and supervisors, including those not engaged in operations, are being trained to detect alcohol and drug use on the job, and the effects on employee performance of alcohol and drug use wherever they may occur.

Supervision is being instructed in how to respond and what action to take when alcohol or drug use is detected or suspected. The theme is to recognize it, stop it,

• • •

Conrail opposes bypass agreements outlined in Option VI for several reasons. First, we are unaware of any consequential benefits resulting from them in terms of prevention or deterrence.

Second, these agreements confuse enforcement with treatment by permitting the "bypass" of sanctions and discipline. In fact, bypass agreements would be inconcsistent [sic] with a federal rule prohibiting on-duty use of alcohol and drug abuse.

Under the Conrail program, once an employee is determined to have violated Rule G, he or she must be disciplined. The employee may also be encouraged to seek help through the Employee Assistance Program,

but it is not an either/or proposition for a very important reason: it is our experience that discipline — removal from service or other financial penalty and potential reinstatement — is essential in prompting employees to solve their performance problems and to get help. As it turns out, in many cases that performance problem is connected to a dependency on alcohol or drugs.

• • •

MR. SWANSON: Well, it's a requirement of operating supervision on our property and I think on most property to make observations daily. They are made daily.

They are formalized by various reports from the railroads indicating the type of observation, how often it is and goes on the employee's record.

I don't think there should be a day go by probably that the employees are not observed in some fashion. In addition to that form of plan, we at Conrail have another plan that we use to make certain that every crew — and I include the whole crew — as observed by the supervisory personnel in that area at least once a month. Every crew on every scheduled job is observed either coming on to duty or before they go off duty so that we can check the fitness from that point of view.

I don't think there can be too much in the way of observation — but formally, it should be done on a daily basis on whatever specific elements you might be driving at.

• • •

ATTACHMENT 2

R. E. SWERT
VICE PRESIDENT
LABOR RELATIONS

November 17, 1983

Mr. John F. Sytsma, President
Brotherhood of Locomotive Engineers
B. of L. E. Building
Cleveland, OH 44114

Dear Mr. Sytsma:

We appreciated the opportunity for extensive discussion of the problems of alcohol use, including by-pass agreements, employee assistance programs, and our alcohol-drug awareness training when we met October 13, 1983. Because of our own continuing efforts to prevent alcohol and drug use by employees and to provide assistance to them when use becomes a problem, it was particularly encouraging to become aware of the strong interest of the Brotherhood of Locomotive Engineers and that you too share our concerns.

I understand that the purpose of the Brotherhood of Locomotive Engineers in advocating by-pass agreements is to establish conditions which will encourage peer referral of employees to deter alcohol or drug use which could impair their own well being as well as endanger the safety of operations. However, as explained when we met, we are not confident that by-pass agreements can significantly achieve that purpose. We are glad to have the information you have given us about by-pass agreements on other railroads. Those agreements which exist, however, are relatively recent and the data with respect to their effectiveness is both limited and inconclusive. Through Conrail's Manager-Employee Assistance, John Gorman, we will remain in contact with the railroads which have by-pass agreements to keep abreast of their application in practice and

their contribution to accomplishing peer referral. Although we are not convinced that by-pass agreements are a solution to breaking the "conspiracy of silence," we plan to keep them under consideration as a possible part of the solution.

The recently concluded FRA meeting on voluntary measures to prevent alcohol and drug use has provided us with an additional means to examine by-pass agreements that are in effect or are being considered. Through the committees established by the FRA and from the information obtained by John Gorman, we feel that we will be in a much better position to assess the efficacy of by-pass agreements at Conrail.

Conrail, at the same time, will continue its several efforts to prevent alcohol and drug use because of their harm to employees and impairment to safety and operations. These efforts will include continuation of our Management Awareness Program. Our experience with it thus far (some 900 participants) indicates that supervisory personnel and employee representatives acquire the capability to identify behavior which may be caused by alcohol and drug use and are motivated to refer employees for assistance before discipline. As the result of their joint participation in this training, we know that employees' supervisors and union representatives have cooperated in referral and we are confident that such cooperation in the interest of employees will occur with increasing frequency. Your willingness to assist has been most encouraging and is deeply appreciated.

Again, thank you for the material on by-pass agreements and for your support of Conrail's efforts to aid employees through deterrence of alcohol and drug use.

Sincerely,

R. E. Swert
Vice President – Labor Relations

ATTACHMENT 3

M. G. Maloof
Chairman

617-799-5859

R. S. Connors
Vice Chairman

G. T. Casey
Secretary

united transportation union
General Committee of Adjustment, GO-081
50 FRANKLIN ST., SUITE 375,
WORCESTER, MA. 01608

May 22, 1986

Mr. K. F. Schwab
Senior Director Labor Relations
Consolidated Rail Corporation
Six Penn Center Plaza, Room 1234
Philadelphia, Pennsylvania 19103-2959

Dear Sir:

This is in regard to the Conrail policy concerning trainmen who have been rejected for employment with Amtrak because of alleged physical disqualification.

Trainman L. Bernard is such an employee. He was rejected by Amtrak because he is alleged to have had a positive result in a drug screen test conducted as part of a pre-employment physical examination required by Amtrak due to their assumption of employees in OFF-CORRIDOR service.

After being rejected for employment with Amtrak Trainman Bernard was ordered by Chief Crew Dispatcher F. J. Wrinn to report for a physical examination by the Conrail Medical Services Department at Selkirk, NY on April 23, 1986. He was also removed from the extra board, (out of service), pending results of the "Physical Examination".

On April 23, 1986 Trainman Bernard was examined by a medical assistant at the Conrail facility in Selkirk, NY at which time he was subjected to a urine test. After the examination was given no information concerning

his physical condition but he was told that it would take about a week to get the results of the drug screen. He remained out of service.

On May 3, 1986 Trainman Bernard received a copy of his "MD-40" which did state that he was "MEDICALLY DISQUALIFIED".

Subsequently during discussion with Conrail Manager Labor Relations J. F. Glass concerning Mr. Bernards status with Conrail I was informed by Mr. Glass that Amtrak had not told Conrail the reason that Mr. Bernard had been rejected and that Amtrak had at no time given Conrail any information as to the results of Amtraks' drug tests.

Further, Mr. Glass stated that as of this time it is Conrails' policy that Mr. Bernard was simply medically disqualified until such time as his own doctor could certify to the carrier that his system was free of drugs.

This committee has serious doubts as to the handling of this matter by both Amtrak and Conrail. It is our feeling at this time that Mr. Bernard's rights were violated, both contractual and legal.

Contractually because Mr. Bernard had his regular periodic physical in 1985 and he was in compliance with Conrail rules at the time he was removed from service. He was further held out of service after taking his examination even though he was not given a reason for being medically disqualified.

Rule 96 (a) of our agreement states that the trainman shall be furnished a copy of the medical report containing the reason for disqualification. This was not done in Mr. Bernards' case.

Further, this committee is unaware of any agreement either written or implied that gives the carrier a right to make periodic or arbitrary test for drugs.

The FRA has listed the requirements for drug testing and the above case does not in any way resemble the circumstances outlined in the FRA Regulations.

Legally because if Amtrak did supply Conrail with the results of their drug test they violated the law. If they did not give Conrail the test results the question arises as to why Conrail coincidentally gave a drug test to an active employee for no discernible reason.

Would you please investigate and advise this committee if Amtrak furnished Conrail with information regarding their physical examination of Trainman Bernard. Would you also advise this committee of the carriers' position as to drug tests at periodic physical examinations. We want to know now if you intend to conduct these tests in an arbitrary manner or if you are going to confine your testing to the circumstances outlines in the FRA Regulations.

Please acknowledge and advise, I remain

Very truly yours,

M. G. Maloof
General Chairman

cc. L. Bernard
S. T. Cowles, Local Chairman
R. E. Frear, General Chairman
Clint Miller, UTU International
E. F. Lyden, UTU-VP

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*, *Plaintiffs*,	)	
v.	)	Civil Action NO. 86-2698
CONSOLIDATED RAIL CORPORATION, *Defendant*.	)	

STIPULATION

In the interest of obviating the need for extensive discovery, counsel for Plaintiff Unions and counsel for Defendant Consolidated Rail Corporation (hereinafter "Conrail") hereby agree to the following facts:

1. Since at least the time of Conrail's inception in 1976, Conrail employees, both those covered by the Hours of Service Act, 45 U.S.C. §§61-64d (hereinafter "the Act"), and those not covered by the Act, have been subject to the provisions of Rule G or rules that are identical in substance to Rule G. Rule G provides:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited. Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties.

2. Conrail has relied upon two methods of enforcing Rule G: 1) supervisory observation; and 2)

encouraging employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine or other diagnostic tests.

3. In August, 1985, the Federal Railroad Administration of the United States Department of Transportation promulgated regulations at 49 C.F.R. §219 *et seq.*, mandating post accident toxicological testing for railroad employees covered by the Hours of Service Act. These regulations became effective on February 10, 1986.

4. Since March 10, 1986, Conrail has required all employees covered by the Hours of Service Act to undergo post-accident toxicological testing as required by the regulations promulgated by the Federal Railroad Administration. Employees who are not covered by the Act are not required to undergo post-accident toxicological testing.

5. Since at least the time of its inception in 1976, Conrail has required all hourly employees, both those covered by the Hours of Service Act and those not covered by the Act, to undergo periodic physical examinations. These periodic examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

6. Since at least the time of its inception in 1976, Conrail has required all train and engine employees who have been out of service for at least thirty days due to furlough, leave, suspension or similar causes to undergo physical examinations upon returning to duty. In addition, since at least the time of its inception in 1976, Conrail has also required all other employees who have been out of service for at least ninety days due to furlough,

leave, suspension or similar causes to undergo physical examinations upon returning to duty. Return-to-duty physical examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

7. Since at least the time of its inception in 1976, Conrail has included a drug screen as part of the return-to-duty and periodic physical examination urinalyses of certain employees. With respect to return-to-duty physical examinations, a drug screen has been included as part of the urinalysis when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. With respect to periodic physical examinations, a drug screen has been included as part of the urinalysis when, in the judgment of the examining physician, the employee may have been using drugs.

Respectfully submitted,

Of Counsel:

MORGAN, LEWIS & BOCKIUS

/s/ Joseph J. Costello
DENNIS J. MORIKAWA
JOSEPH J. COSTELLO
2000 One Logan Square
Philadelphia, PA 19103

HERMON M. WELLS
CONSOLIDATED RAIL CORPORATION
6 Penn Center Plaza
Philadelphia, PA 19104

Attorneys for Defendant
Consolidated Rail Corporation

/s/ Lawrence M. Mann
LAWRENCE M. MANN
DEBORAH E. REISER
Suite 811
400 First Street, N.W.
Washington, D.C. 20001

Of Counsel:

ALPER, MANN & REISER

CORNELIUS O'BRIEN
1500 Market Street
Philadelphia, PA 19102

Attorneys for Plaintiff
Unions

Approved and So Ordered this 11th day of February, 1987.

/s/ A. Scirica
U.S.D.C.J.

COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF PHILADELPHIA :

AFFIDAVIT

I, F. J. Ilsemann, Jr., being duly sworn according to law, depose and say as follows:

1. I am employed by Consolidated Rail Corporation (hereinafter "Conrail") as Director of Health Services. In that capacity, I have overall responsibility for formulating medical standards applicable to Conrail employees and supervising the implementation of medical policies and procedures consistent with these medical standards. These medical standards include those applicable to the periodic, return-to-duty and follow-up physical examinations required of Conrail employees.

2. As a result of advances in medical science and medical technology, Conrail has periodically revised its medical standards. For example, for many years Conrail relied upon an examining physician's voice to conduct employee hearing tests. Conrail modified its procedures, however, to provide for the use of audiometers to conduct such tests. Similarly, Conrail now conducts spirometric examinations, measuring lung capacity, using computers rather than the calibrated bellows used in the past. Conrail has also revised its methods of conducting electrocardiograms and visual examinations based on advances in medical technology. These modifications have been made unilaterally without any consultation with Conrail's unions.

3. Conrail requires its employees to undergo several types of medical examinations including

periodic physicals, return-to-duty physicals and return-to-duty follow-up examinations. These examinations have been routinely conducted since at least the time of Conrail's inception in 1976. Descriptions of these examinations and the employees to whom they apply are set forth in Conrail's Medical Standards Manual. Relevant portions of the Medical Standards Manual are attached hereto as Attachment A.

4. Conrail requires employees to undergo periodic physical examinations every three years up to and including age fifty and every two years thereafter, with some exceptions as set forth in Attachment A. All periodic physical examinations have routinely included a urinalysis for blood sugar and albumin. A drug screen was also included as part of the periodic physical urinalysis when, in the judgment of the examining physician, the employee may have been using drugs. On April 1, 1984, Conrail issued a Medical Standards Manual, attached hereto as Attachment A, which provided that a drug screen would be included as part of all periodic physical urinalyses. For budgetary reasons, this policy was only applied in one of Conrail's regions, the Eastern Region, for a six month period and was then discontinued (Conrail's rail operations are divided into four regions: the Eastern Region, headquartered in Philadelphia; the Western Region, headquartered in Detroit; the Northeastern Region, headquartered in Selkirk, New York; and the Central Region, headquartered in Pittsburgh). Conrail then returned to its original policy of including drug screens as part of the periodic physical urinalysis only when, in the physician's judgment, the employee may have been using drugs. On February 20, 1987, however, Conrail announced that drug screens would be included as part of all periodic physical urinalyses.

5. With respect to return-to-duty physical examinations, such examinations have been required of all train and engine employees who have been out of service for at least thirty days due to furlough, leave, suspension, or similar causes. Other employees who have been out of service for at least ninety days are also required to undergo physical examinations upon returning to duty. These examinations have routinely included a urinalysis for blood sugar and albumin. In addition, a drug screen was originally included as part of the urinalysis when the employee had been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. When Conrail issued its Medical Standards Manual on April 1, 1984, the manual provided that drug screens would be included as part of all return-to-duty urinalyses. As with periodic physical examinations, this policy was only applied to Conrail's Eastern Region for a six-month period. Conrail thereafter returned to its original policy of requiring a drug screen only when the employee had been previously taken out of service for a drug-related problem, or when, in the judgment of the physician, the employee may have been using drugs. On February 20, 1987, however, Conrail also announced that a drug screen would be included as part of all return-to-duty urinalyses.

6. With respect to return-to-duty follow-up examinations, also known as periodic-special examinations, Conrail's Department of Health Services has been responsible for determining whether an employee's condition justified requiring follow-up examinations to evaluate the employee's continuing fitness to work after he or she has returned to duty. Such follow-up examinations have, for example, been required of employees who have suffered heart

attacks, or have been diagnosed as having hypertension or epilepsy. On February 20, 1987, Conrail announced that its follow-up examination policy would also apply to employees who return to duty from being disqualified for any reason associated with drug use.

7. Since at least the time of its inception in 1976, Conrail has required that any employee who undergoes a periodic, return-to-duty or follow-up physical examination and who fails to meet Conrail's established medical standards may be held out of service without pay until the condition is corrected or eliminated. Thus, for example, employees have been held out of service until their vision can be corrected or their blood pressure reduced to meet medical standards. Employees have also been held out of service if their blood sugar, as revealed by urinalysis, is too high. Employees who fail to meet Conrail's medical standards by testing positive for illegal drugs will not be returned to service unless they can provide a negative drug test within forty-five days from a medical facility to which the employee is referred by Conrail's Medical Director. This forty-five day period begins on the date of the letter notifying the employee that he or she is being withheld from service. An employee whose first test is positive is given the opportunity for an evaluation by Conrail's Employee Counseling Service. If the evaluation reveals an addiction problem and the employee agrees to enter an approved treatment program, the employee will be given an extended period of 125 days to provide a negative drug test.

8. Conrail also requires job applicants to submit to a drug screen as part of the urinalysis which is required of all applicants during pre-employment physicals. These drug screens are also part of the

physical examinations required of Conrail's executives. Conrail does not, however, conduct "reasonable suspicion" testing of its employees as authorized by the Federal Railroad Administration's regulations entitled "Control of Alcohol and Drug Use in Railroad Operations."

9. The foregoing facts are true and correct and based upon my personal knowledge, and knowledge obtained by me in the course of the performance of my duties as Director of Health Services.

/s/ F. J. Ilsemann, Jr.
F. J. Ilsemann, Jr.

Sworn to me and subscribed before me this 6th day of March, 1987.

/s/ Alfonso J. DiGregorio
Notary Public

ALFONSO J. DiGREGORIO
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires September 24, 1988

IV. DESCRIPTION OF MEDICAL EXAMINATIONS

PRE-EMPLOYMENT

Who: All job applicants

Content: Full medical history

Complete physical examination including funduscopic, blood pressure, pulse, temperature, height and weight

Routine urinalysis, including a screen for the use of controlled substances

Visual examination for near and distant vision, uncorrected and corrected

Color vision evaluation

Hearing examination, including baseline audiogram

Spirometry

Base line EKG for all Class A applicants

Frequency: At the time of employment

Forms used: MD-40 and MD-1

PERIODIC-REGULAR

Who: All employees as listed in frequency schedule below

Content: Full medical history

Complete physical examination including funduscopic, blood pressure, pulse, temperature, height and weight

Routine urinalysis, including a screen for the use of controlled substances

Visual examination for near and distant vision, uncorrected and corrected

Color vision evaluation

Hearing examination if employee is subject to the Hearing Conservation Program

Spirometry

EKG required only on Locomotive Engineers, Hostlers or Firemen

Frequency: Positions listed below require periodic examinations every three years up to and including age 50 and every two years thereafter, with exceptions noted:

Train and Engine Service Employees (Locomotive Engineer, Fireman, Hostler, Conductor, Brakeman, Flagman, Switchtender)
Exception: State of New Jersey requires annual periodic examination of Locomotive Engineers

Road Foreman of Engines

Trainmaster

Block Operator, Towerman, Leverman

Crane or Derrick Operator, Machine Operator (Class 1 and 2)

Operator of Over-the-Highway Vehicles
Exception: Operator of Over-the-Highway Vehicles require periodic examination every two years

Police Officer

Inspection and Repair Foreman

Employee engaged in preparation/serving food. Exception: must be examined annually

Train Dispatcher

Any non-agreement employee who works around heavy moving equipment Exception: Division Superintendents must be examined annually

Supervisory positions in Systems Operations Bureau Exception: Must be examined annually

Forms used: MD-40 and MD-2D

PERIODIC-SPECIAL

Who: In-service employees requiring re-evaluation of an existing condition as initiated by examining physician.

Content: Medical re-evaluation of pre-existing condition after appropriate interval set by examining physician at initial examination.

Frequency: As established by examining physician (e.g. 1 month, 3 months, etc.)

Forms used: MD-40 and MD-2D or MD-2C.

RETURN FROM FURLOUGH, LEAVE, SUSPENSION OR SIMILAR CAUSES

Who: Employees who are returning to service after an absence for other than disability reasons.

Content: Full medical history

Complete physical examination, including funduscopic blood pressure, pulse, temperature, height and weight

Routine urinalysis, including a screen for the use of controlled substances

Visual examination for near and distant vision, uncorrected and corrected

Color vision evaluation

Hearing examination if employee is subject to the Hearing Conservation Program

Spirometry

EKG, required only on Locomotive Engineers, Hostlers or Firemen.

Frequency: Required of Train and Engine Service employees after 30 days absence

Required of all employees, other than Train and Engine Service, absent more than 90 days

Forms used: MD-40 and MD-2D or MD-2C

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION

IN RE:
CONTROL OF ALCOHOL AND DRUG USE IN RAILROAD OPERATION ADVANCE NOTICE OF PROPOSED RULEMAKING
Docket No. RSOR-6

The above entitled matter came on for hearing on September 1 and 2, 1983, at the Department of Transportation, 7th & C Streets, S.W., Room 2230, Washington, D.C.

BEFORE PANEL MEMBER:
THOMAS A TILL, Chairman, Deputy Administrator
JOHN M. MASON, Chief Counsel
JOSEPH W. WALSH, Associate Administrator for Safety
WALTER ROCKEY, Special Assistant to Associate Administrator to Safety
GRADY C. COTHEN, Esquire

• • •

[166]

be doing later on when he's in a much larger and more dangerous vehicle, in other words he has a great deal more responsibility for the public at one time.

MR. TILL: Are there any questions from the audience? If not, thank you very much for your testimony and your appearance here today and for the information that you provided.

MS. NATHANSON: Thank you.

MR. TILL: The next witness is Mr. Don Swanson, the Vice President of Operations of Consolidated Rail Corporation, accompanied by a panel.

MR. SWANSON: Thank you, Mr. Chairman, members of the panel. I'm Donald Swanson, Vice President – Transportation of the Consolidated Rail Corporation.

Accompanying me are Mr. Herman Wells, our legal representative and John Gorman, our Manager of Employee Assistance.

On behalf of Conrail, I want to express appreciation for this opportunity to contribute information and views for resolving the problem of alcohol and drug use in the railroad industry.

My own department has a major part of the responsibility for promoting safety by working.

• • •

[185]

MR. MASON: You mean mandatory by FRA?

MR. WELLS: What we intended to convey was that we would like to have authority to use those breathalyzers to test when we thought there was a reason to test or maybe even occasionally for spot checks. But we would not like a requirement by the FRA that we should use them in all cases.

MR. MASON: In principle then, you do not think that occasional random use of the breath testing device – assuming the proper safeguards – is in and of itself warranted –

MR. WELLS: No, it would be useful deterrent.

MR. MASON: But to clear that up, do you believe that at some point unregulated, overzealous use of a testing device on a random basis could reach a level of operation that would be inappropriate?

MR. WELLS: It might.

MR. MASON: Thank you, that's all I have.

MR. TILL: Are there any further questions from the audience? Mr. Cothen?

MR. COTHEN: Does Conrail require any annual physicals?

MR. SWANSON: Yes, it does.

MR. COTHEN: Are they performed by private physicians?

[186]

MR. SWANSON: In some cases – well, they're performed in some cases by private physicians under contract with Conrail.

MR. COTHEN: Are the physicians asked to do a drug screen of –

MR. SWANSON: No, they are not.

MR. COTHEN: Have you considered it?

MR. SWANSON: Not that I'm aware of.

MR. COTHEN: Would it present any – obstacles?

MR. SWANSON: Not to my knowledge, no.

MR. TILL: Thank you, Mr. Swanson.

The next witness is Mr. William Johnston of the Association of American Railroads, accompanied by Mr. Holiis Duensing.

MR. DUENSING: Mr. Till, I apologize for not having extra statements of Mr. Johnston here with us today.

As you know, we were scheduled to appear tomorrow and in view of previous comments that you – indicating that you'd like to hear us today, we must proceed on the basis of our draft statement. And I have an extra copy which I can either give to the panel or to the reporter, whichever you wish.

• • •

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION

IN RE:
CONTROL OF ALCOHOL AND DRUG USE IN RAILROAD OPERATION ADVANCE NOTICE OF PROPOSED RULEMAKING
Docket No. RSOR-6

The above entitled matter came on for hearing on September 1 and 2, 1983, at the Department of Transportation, 7th and C Streets, S.W., Room 2230, Washington, D.C.

BEFORE PANEL MEMBER:
THOMAS A. TILL, Chairman, Deputy Administrator
JOHN M. MASON, Chief Counsel
JOSEPH W. WALSH, Associate Administrator for Safety
WALTER ROCKEY, Special Assistant to Associate Administrator to Safety
GRADY C. COTHEN, Esquire

BEFORE THE
UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION

CONTROL OF ALCOHOL AND DRUG
ABUSE IN RAILROAD OPERATIONS
FRA DOCKET NO. RSOR-6, NOTICE NO. 1

COMMENTS OF THE ASSOCIATION
OF AMERICAN RAILROADS

My name is A. William Johnston, Vice President, Operations and Maintenance Department, Association of American Railroads.

The nation's railroads are committed to the strong and effective enforcement of the existing prohibitions against the use of alcohol and drugs and the possibility of employees performing duties when under the influence of alcohol or drugs. Both management and labor have devoted substantial resources in attacking this issue within each railroad. Unfortunately, public perception of the railroad's success in enforcing its regulations is formed by nonrailroad sources. Public attention to the issue of drug and alcohol abuse enforcement is beneficial to the extent it motivates reasonable private and public action but detrimental to the extent it creates the impression that nothing is being done or that railroads are lax in enforcing their rules.

• • •

person's sense of fairness and reasonableness nor is there any outcry against such public use as being an unreasonable invasion of the motorist's right to privacy. In the case of railroad employees engaged in duties directly affecting public safety, the issue is not an

abstract matter of the right to privacy — it is a question of public safety. *Railroad employees do not have a right to privacy which rises above public interest in safety.*

The railroads should be free to use state-of-the-art testing devices on a selective basis. A railroad should have the ability to expend its resources in an efficient manner and thus could pinpoint specific problem locations on an unannounced spot basis. Unless the railroad has the ability to set the criteria for use of such devices it may be deprived of the ability to use the devices in a manner which effectively deters Rule G violations. *Because of existing grievance procedures, there is very little chance that tests will be administered in an unreasonable manner.*

Importantly, it is essential that *the breath analysis tests and similar tests be used and viewed as merely supplemental to existing methods of enforcing Rule G.* The traditional methods of determining Rule G violations — incoherent speech, slurring, unsteady gait, smell of alcohol, etc. — will still be relied upon and serve as the basis for disciplinary action for Rule G violations.

• • •

In addition to using state-of-the-art testing devices on a controlled random basis, the railroads will be free to use them in

• • •

FORM L
NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

With Referee Robert M. O'Brien

Award 23334
Docket 43260

PARTIES TO DISPUTE (Brotherhood of Locomotive Engineers
(Southern Pacific Transportation Company (Pacific Lines)

STATEMENT OF CLAIM: "Where the agreements and past practices in effect between the General Committees of Adjustment, Brotherhood of Locomotive Engineers, on the Southern Pacific Transportation Company (Pacific Lines and former Pacific Electric) and the carrier do not provide for the mechanical or chemical testing of its employees to determine whether they are under the influence of intoxicants or for the disciplining of any employee refusing to accede to such testing or registering any positive reading on the testing device, may the Southern Pacific Transportation Company unilaterally establish and engage in an Intoxilyzer Program by which it indiscriminately and without probable cause compels its locomotive engineers to submit to breath tests in order to determine their blood alcohol content and disciplines any employee refusing to submit to such testing or having a positive reading of any degree whatsoever?"

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

STATEMENT OF THE CASE

On January 15, 1980, the Southern Pacific Transportation Company (hereinafter referred to as the Carrier) forwarded to all General Chairmen who represented employees on its Pacific Lines an advance copy of two articles which were scheduled to appear in Carrier's house organ, the Southern Pacific Bulletin, in January, 1980. The articles explained how the Carrier intended to address the trouble it was experiencing with employees who had alcohol related problems. The article went on to state that the Company intended to spot check employees, particularly those who operate moving equipment, with a devise [device] referred to as an "Intoxilyzer." The Intoxilyzer, according to the article, measures the concentration of alcohol in one's bloodstream through analysis of a breath sample.

The Carrier advised its General Chairman that the Intoxilyzer would be demonstrated throughout the system on a random basis. At each location all employees would be notified in advance of the demonstration. While employees would be required to blow into the Intoxilyzer, Carrier made it clear that no disciplinary action would be taken during the demonstration period.

Eight months later, by letter dated September 16, 1980, the Carrier notified its Union representatives that the demonstration period had ended and henceforth its Intoxilyzer program would be placed in effect. As will be explained hereinafter, this program required *all* employees who were either going on duty or who were already on duty to subject themselves to Intoxilyzer testing.

On September 26, 1980, employees represented by the Brotherhood of Locomotive Engineers (hereinafter referred to as the Organization) commenced a strike on Carrier's Western Lines claiming that Carrier's unilateral implementation of its Intoxilyzer program violated the Railway Labor Act. On November 14, 1980, the

United States District Court for the Northern District of California issued a preliminary injunction enjoining the employees from striking the Carrier. The Court rule, *inter alia*, that Carrier's enforcement and use of Intoxilyzer testing constituted a "minor dispute" under the Railway Labor Act. The Court issued a further Order which provided, in pertinent part, as follows:

> "IT IS FURTHER ORDERED that, until such time as the National Railroad Adjustment Board has rendered a final decision on the uses of the Intoxilyzer, the plaintiff railroad shall either (1) refrain from discharging any employee engineer covered by the agreement between the plaintiff and defendant union for insubordination based upon an employee's refusal to submit to Intoxilyzer testing, or for a violation of Rule G, or other rule, proof of which is based upon the use of Intoxilyzer test results or (2) pay any said employee so discharged the wages that he or she would have received, until such time as the Board renders its final decision."

Pursuant to the Decision and Order of the United States District Court for the Northern District of California, the First Division of the National Railroad Adjustment Board (hereinafter referred to as the Board) convened a hearing on June 25, 1981. At that hearing, voluminous evidence and arguments were proffered to the Board by the Organization and by the Carrier. Following a careful analysis of that extensive evidence, this Board renders the following Findings and Award.

STATEMENT OF THE ISSUE

It is unfortunate that neither the Court's Opinion nor its Order succinctly framed the issue to be decided by this Board. The Court simply ruled that the dispute was a "minor dispute" under the Railway Labor Act and must therefore be decided by the National Railroad Adjustment Board. Its Order declared that the Board shall render "a final decision on the uses of the Intoxilyzer."

This lack of precision is exacerbated by the failure of either the Organization or the Carrier to frame an objective statement of the issue to be adjudicated.

Accordingly, it is the view of this Board that the following accurately reflects the question to be decided herein:

> Did the Intoxilyzer program implemented by the Carrier by Special Notice No. 64 dated September 22, 1980, violate the collective bargaining agreement in effect between the Brotherhood of Locomotive Engineers and the Southern Pacific Transportation Company?
>
> If so, what shall be the remedy?

BACKGROUND

In June, 1973, a serious accident occurred when one of Carrier's trains collided with the rear of another train which had stopped at Indio to change crews. An Engineer and a Head Brakeman were killed in the collision. The National Transportation Safety Board investigated the collision and concluded that the Engineer of one of the trains was under the influence of alcohol and that this was the direct cause of the collision.

On July 24, 1979, another rear-end collision occurred between two Southern Pacific Transportation Company trains at Thousand Palms, California. The

Engineer of one of the trains died following the collision as a result of smoke and fire. Moreover, four crew members were injured and damage was estimated by the Carrier at $1.5 million. The National Transportation Safety Board investigated this collision. An analysis of the Engineer's urine revealed a blood-alcohol level of 0.18%. The National Transportation Safety Board reiterated an earlier recommendation it had made to the Carrier in 1974 to "Establish more effective procedures to insure that employee's [sic] comply with the Operating Rules such as by requiring that conductors examine crew members coming on duty to ascertain their apparent physical competence to perform their responsibilities."

In November, 1979, Carrier purchased an Intoxilyzer machine. The Intoxilyzer is an electronic device developed by CMI, Inc. which measures the blood-alcohol concentration (hereinafter referred to as BAC) through an analysis of one's breath sample. The model purchased by the Carrier was Model #4011AS.

As observed heretofore, in January, 1980, the Carrier advised its Unions, including the Brotherhood of Locomotive Engineers, that it intended to demonstrate the use of the Intoxilyzer on major on and off-duty points during a ninety-day familiarization period. On September 16, 1980, Carrier informed its Unions that the demonstration period had ended and that all employees would be subject to compulsory intoxilyzer testing. On or about September 22, 1980, the Carrier issued Special Notice No. 64 advising Trainmen, Enginemen and Yardmen that the Intoxilyzer program is now in effect. Special Notice No. 64 provided, in its entirety, as follows:

SPECIAL NOTICE NO. 64

TRAINMEN, ENGINEMEN AND YARDMEN

As you are aware, in our January 1980 Bulletin, information was distributed to all Southern Pacific employees about the need for a program to provide employes with a working environment where employe safety is not threatened by the use of alcohol by any employe while working or while subject to duty.

Demonstration of the Intoxilyzer, also as described in the Bulletin Article, has provided a widespread exposure of the device and its operation to employes. In general, cooperation during demonstration has been excellent and the display of employe interest in the safety objectives of the program is appreciated.

The Intoxilyzer demonstration period has now ended and a program involving use of Intoxilyzer has been developed for immediate implementation. The program is as follows and is now in effect.

1. All employes going on or while on duty will be subject to Intoxilyzer testing.

2. Upon going on duty –

a. Any registration or refusal to blow into the Intoxilyzer will result in employe not being allowed to assume duty.

b. Registration of .10 percent or more will also result in employe being taken out of service and charged with violation of Rule G.

3. Except as provided in Item 2(a) above, any registration while on duty will result in employe being taken out of service and charged with violation of Rule G.

4. Any employe causing a registration on the Intoxilyzer will be tested twice, the second time after a 15-minute interval to validate the reading.

5. Each employe will be given a copy of the Intoxilyzer printout. Copies will also be retained by the division and a copy will be placed on the employe's personal record file if a registration occurs.

Use of Intoxilyzer is in addition to the established procedures for dealing with Rule G.

We again solicit the cooperation of the employes and Unions representatives in the application of this program which is aimed simply at eliminating alcohol abuse affecting the safety of employes, the public, and railroad operations.

M. D. Ongerth
Superintendent

It was Carrier's unilateral implementation of this program that caused employees represented by the Brotherhood of Locomotive Engineers to commence a strike on September 26, 1980. Again, as observed, *supra,* the United States District Court for the Northern District of California enjoined that strike and referred the dispute between the parties respecting the Intoxilyzer program to this Board.

ORGANIZATION'S POSITION

Throughout this controversy, the Organization has claimed that the Railway Labor Act; the collective bargaining agreement; and past practice all proscribed the Carrier from unilaterally promulgating the Intoxilyzer program. According to the Organization, the use of alcoholic beverages, intoxicants, or narcotics by employees subject to duty or their possession, use, or employees' being under the influence of alcohol while on

duty or on Company property has always been prohibited. This prohibition is contained in Rule G of Carrier's Rules and Regulations of the Transportation Department.

The Organization argues, however, that Rule G does not refer to breath testing, nor does it grant the Carrier the authority to compel employees to subject themselves to any mechanical or chemical testing device to determine their blood-alcohol content. The Organization emphasizes that Rule G does not grant Carrier the authority to compel mechanical or chemical tests, nor does it allow it to discharge employees for refusing to take such a test.

The Organization submits that the Carrier has conceded that as a matter of long-standing practice, the evidence it has relied on in alcohol abuse cases under Rule G has been essentially based on visual observation, surmise, and circumstantial suspicion; viz, flushed face, thick voice, slurred words, and other relevant outward physical manifestations. This, in the Organization's judgment, constitutes an admission by the Carrier that under the previous longstanding past practice, there must be probable cause from observation or from some outward physical manifestation before an employee could be charged with violating Rule G. The Intoxilyzer program contains no element of probable cause, however. The Organization avers that the collective bargaining agreement, and the past practice on this property, do not allow the Carrier to unilaterally implement the systematic and indiscriminate breath testing of employees, nor do they allow the Carrier to discipline any employee for refusing to engage in such a breath test. Absent such authority, it is the opinion of the Organization that the Carrier had no right to unilaterally implement the Intoxilyzer program on or about September 22, 1980.

The Organization further asserts that the Intoxilyzer program is improper due to the criterial unilaterally established by the Carrier to determine the conditions under which one is determined "under the influence of alcoholic beverages." For instance, under the program, alcohol content of .01 percent is sufficient to constitute being under the influence. Moreover, according to the Organization, the Intoxilyzer machine used by the Carrier is neither reliable nor accurate. The Organization stresses that according to CMI, Inc., the corporation which manufactures the Intoxilyzer, the machine's margin of error is ±.01. Accordingly, the Intoxilyzer may register the presence of alcohol in one's bloodstream even though that individual had absolutely no alcohol in his/her bloodstream. The Intoxilyzer is also unreliable, in the Organization's judgment, since it lacks the ability to detect ethyl alcohol in one's body to the exclusion of all other substances. Thus, one who has consumed food such as rum cake or lemon drops, or who has acetone on his breath, may register a positive reading on the Intoxilyzer even though he has consumed absolutely no alcohol. Indeed, the Organization emphasizes that a Court in Ohio has ruled that the Intoxilyzer breath-testing device is simply unable to accurately determine how much alcohol is in the human bloodstream. The Ohio Court found the Intoxilyzer machine unreliable, and not based on reliable scientific principles, inasmuch as there were many variations within a human body that were not taken into account by the Intoxilyzer machine. It is the Organization's contention that employees should not be deprived of their seniority rights based on such unreliable test results.

The Organization further argues that when the Carrier unilaterally abolished the well-established working conditions applicable to the engine service employees when it removed the probable cause aspect of Rule G

and changed the method by which the Rule was administered, Carrier violated not only the collective bargaining agreement and the past practice that had been [in] effect on this property for over 50 years, but it also contravened the Railway Labor Act. It avers that when Carrier required its Engineers to involuntarily submit to breath tests and punished them for refusing to do so, Carrier thereby violated Section 2, Seventh, and Section 6 of the Railway Labor Act.

It is further the contention of the Organization that the Intoxilyzer program, as designed and administered by the Carrier, transgresses a number of individual and constitutional rights guaranteed all individuals. For example, according to the Organization, this program violated the Fourth Amendment to the United States Constitution since its use was clearly an unreasonable search and seizure. The program as administered by the Carrier, the Organization stresses, did not require a threshold determination of probable cause to believe that the individual who was required to take the Intoxilyzer test indeed had alcohol in his/her blood. The Organization submits that alternatives were available to the Carrier that would not intrude on Engineers' constitutional and personal rights.

The Organization also asserts that the Intoxilyzer program was contrary to the right of privacy guaranteed all residents of California by Article 1, Section 1 of the California Constitution. The Organization submits that use of the Intoxilyzer is precisely the type of surveillance prohibited by Article 1, Section 1 of the California Constitution; and constitutes an overbroad collection of data without the presence of probable cause which again is proscribed by the California Constitution.

The Organization further claims that use of the Intoxilyzer by the Carrier was contrary to the principles enunciated by the Supreme Court of the United States

in the landmark case of *N.L.R.B. v Weingarten, Inc.*, 420 US 251. According to the Organization, employees who are required to submit to compulsory Intoxilyzer testing are denied the right to Union representation guaranteed by the Supreme Court in *Weingarten*. Interference with employees' personal, constitutional, and legal rights would, standing alone, render the Carrier's Intoxilyzer program impermissible, according to the Organization. When these impingements are considered in the light of the long-standing past practice wxtant [sic] on this property, the Organization asserts that it becomes manifestly clear that the Carrier lacked authority to establish a compulsory mechanical or chemical testing program such as it promulated [promulgated] in September, 1980.

CARRIER'S POSITION

The Carrier insists that the Intoxilyzer program is merely a more effective and objective method of enforcing the spirit and intent of Rule G. Its implementation and use clearly did not involve a change in rules or working conditions, and the United States District Court for the Northern District of California so ruled. The Carrier maintains that it has assumed a high degree of responsibility for the safety of its employees as well as for the safety of the public. Use of the Intoxilyzer machine was merely one means of carrying out this responsibility, the Carrier asserts.

The Carrier claims that for over 50 years all Railroads in the United States have detected the use of alcohol on the part of their employees by their outward physical manifestations. It insists that the Intoxilyzer is merely an advanced methodology used to test employees' sobriety. It is no different in principal from traditional methods of observation previously employed by Railroads, the Carrier asserts. The Intoxilyzer is a method of observation, not a determination in itself, in

the Carrier's judgment. It is simply an additional method of observation; is more objective than previous methods of observation; and is quite accurate. Indeed, the Intoxilyzer machine was found to be extremely accurate by the United States Department of Transportation. The Carrier insists that the Organization's assertion that the Intoxilyzer machine is unreliable and inaccurate is simply not borne out by the evidence at hand. The Carrier further maintains that it has always been its prerogative to test employees for intoxication. Use of the Intoxilyzer, in the Carrier's judgment, is merely a modern method of measuring alcohol used in conjunction with visual observation as part of its on-going program to insure the safety of its employees and the safety of the public. Neither the contract nor past practice specifically precluded the Carrier from detecting intoxication by use of the Intoxilyzer machine, the Carrier asserts.

The Carrier emphatically denies the Organization's contention that probable cause has always been required before the Carrier was allowed to charge an employee with violating Rule G. It insists that this Carrier, and the railroad industry in general, have always tested for Operating Rule compliance without probable cause being established.

According to the Carrier, this Board clearly has no jurisdiction to consider the applicability of State or Federal Law to this dispute. The contract in effect between the parties does not incorporate external laws. It has been well established, in the Carrier's view, that this Board has no jurisdiction to interpret State or Federal law. Thus, the Organization's contention that the Intoxilyzer program violates the Railway Labor Act; the California Constitution; and the United States Constitution, is simply a matter beyond the authority of this Board.

Notwithstanding the fact that this Board lacks jurisdiction to interpret State and/or Federal law, nevertheless, the Carrier asserts, the State and Federal law cited by the Organization in support of its argument is simply misplaced. For instance, Carrier avers that the Railway Labor Act was clearly not violated inasmuch as the United States District Court for the Northern District of California ruled that the Intoxilyzer program did not constitute a change in rules or working conditions. The Court stressed that engineers on this property always faced the possibility of discharge for violation of Rule G. Nor was the Fourth Amendment of the United States Constitution applicable to the Intoxilyzer program, Carrier states, since the Federal Constitution only prohibits unreasonable searches and seizures conducted by governmental entities. It does not create a general right of privacy, however. Moreover, the cited provisions of the California Constitution are not germane to this dispute since they were never intended to encompass bodily searches. Rather, they were intended to eliminate the unnecessary dissemination of personal information, a subject clearly not involved herein.

Finally, the Carrier insists that the decision of the United States Supreme Court in *N.L.R.B. v. Weingarten, Inc.* is inapposite to this proceeding since there the Supreme Court interpreted the National Labor Relations Act, not the Railway Labor Act. The principles enunciated in *Weingarten,* even were they germane to the circumstances prevalent here, have no application to the railroad industry, the Carrier emphasizes.

The Carrier insists that all Divisions of the National Railroad Adjustment Board have consistently ruled that railroads not only have the right, but indeed the duty, to take all precautions, and to establish rules and standards for the protection of its employees and the public. Unless restricted by the terms of the parties' collective bargaining agreement, the Carrier submits that it retained the

right to discharge this responsibility by instituting the Intoxilyzer program in September, 1980. It avers that it is not necessary that a contractual provision exist granting it this right, as the organization contends. Rather, the burden rests with the Organization to demonstrate that a specific rule bars implementation and use of the Intoxilyzer. The Carrier insists that the Organization has cited no such rule which precluded it from utilizing the Intoxilyzer machine as a method to assure its employees' sobriety. Its use of Intoxilyzer testing did not violate the collective bargaining agreement; past practice; or any Federal or State law, the Carrier asserts. Rather, its use and implementation was consistent with its duty to do everything possible to guarantee the safety of its employees and that of the public. For these reasons, its implementation and use of the Intoxilyzer must be upheld by this Board.

FINDINGS

The record before us clearly evidences that the parties' written agreement neither specifically allows nor specifically proscribes the use of mechanical or chemical testing to determine whether Carrier's employees are under the influence of alcohol. Yet, it is now well established that bargaining relationships encompasses significantly more than the express written terms of collective bargaining agreements. Indeed, it has been decided repeatedly – both by Arbitrators and by Courts of Law – that custom and practice may, under some circumstances, attain the status of contractual rights and obligations. Thus, past practice may be just as much a part of one's contract as the written terms thereof.

On at least two occasions, the Supreme Court of the United States has had occasion to address this precise question of custom and past practice. In *United Steelworkers of America v. Warrior and Gulf Navigation Company,* 80 S.Ct. 1347, 1351, the Court declared that:

"The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern the myriad of cases which the draftsmen cannot wholly anticipate . . . the collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant."

The Court went on to cite with approval, the observations offered by a seasoned labor arbitrator (*Cox, Reflections Upon Labor Arbitration*, 72 Harvard Law Review 1482). Quoting *Cox* the Court stated:

". . . There are too many people, too many problems, too many unforceable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words."

The Court proceeded to clearly rule that the labor arbitrator's source of law is not contained in the express provisions of the contract. It declared that:

"The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practice of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it."

The Supreme Court in a later decision involving the Railway Labor Act reiterated the findings it forged in *Warrior and Gulf*. Although *Detroit and Toledo Shore*

Line Railroad Company v. The United Transportation Union, 396 US 142, addressed settlement of the Railway Labor Act, nevertheless the Court's reasoning is equally applicable to disputes under Section 3 of the Act, in our judgment. The Court in *Detroit and Toledo Shore Line* stressed the following:

"The obligation of both parties during a period in which any of these status quo provisions (Section 6 of the Railway Labor Act) is properly invoked as to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

"It is quite apparent that under our interpretation of the status quo requirement, the argument advanced by the Shore Line had little merit. The railroad contends that a party is bound to preserve the status quo and only those working conditions covered in the parties' existing collective agreement, but nothing in the status quo provisions of Sections 5, 6 or 10 suggests this restriction. We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement. Thus, the mere fact that the collective agreement before us does not expressly permit outlying assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions."

The Court reiterated its findings in *Warrior and Gulf* when it stated:

"It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others."

What is obvious from the foregoing pronouncements is that in industry in general, and in the railroad industry in particular, there is more to parties' contractual relationships than the express written terms of their collective bargaining agreements. The authority of this Board is clearly not confined to the express provisions of the parties' contract. Rather, practices prevailing in this industry, and practices extant on this particular Carrier, are equally a part of the collective bargaining agreement although not expressed therein. Accordingly, if a past practice was shown to exist that either allowed or proscribed Carrier's use of the Intoxilyzer machine, then that practice must be given effect by this Board, notwithstanding the absence of an express term of the agreement addressing this precise subject.

The standards for determining under what circumstances an unwritten practice will be held binding as an implied condition of employment are admittedly imprecise. However, that dilemma is not present in this particular dispute. The parties readily concede that at least for the past 50 years, the practice on this property has always been that evidence of intoxication was based on visual observation; surmise; and other outward physical manifestations, such as a flushed face, slurred speech, unsteady gait, glassy eyes, etc. Indeed, the Carrier has readily agreed that this had always been the sole means it employed for determining whether its employees were under the influence of alcohol. Carrier further agrees that prior to institution of the Intoxilyzer program in September, 1980, it has never required its

employees to submit to any mechanical or chemical device to test their blood-alcohol levels.

In light of this admission by the Carrier, it is manifestly clear that for the past 50 years, both the Organization and the Carrier have acquiesced in the visual observation of employees, and their outward physical manifestations, as the method for determining whether employees were under the influence of alcohol and thereby in violation of Rule G. Based on this Board's experience, it is our firm belief that this method for determining intoxication has prevailed not only on this property, but throughout the entire railroad industry for a considerable period of time.

In the light of the foregoing, the central question that must be addressed by this Board is whether Carrier possessed the right to unilaterally abrogate this well-enunciated, long-standing practice by implementing its Intoxilyzer program on or about September 22, 1980? For the reasons expressed hereinafter, this Board finds that Carrier had no authority to unilaterally abrogate this practice.

Initially, this Board must take exception to the Carrier's claim that the United States District Court for the Northern District of California ruled that Carrier's use of the Intoxilyzer did not constitute a change in rules or working conditions. Were that the Court's decision, there would be no question for this Board to address. Obviously, the crucial issue involved in the proceeding before the United States District Court (No. C-80-3753-WAI) was strictly a jurisdictional one. When that Court ruled that the dispute before it constituted a "minor dispute" under the Railway Labor Act, it deferred resolution of that minor dispute to this Board. Implicit in its referral was the Court's acknowledgment that it shall be our authority, at least in the first instance, to determine whether the controlling agreement proscribed use

of the Intoxilyzer program. This Board has carefully reviewed the record in that Court proceeding. There is simply no evidence in that record that the custom and practice on this property, or that the custom and practice prevalent in the railroad industry, were issues addressed by the Court when it considered the Carrier's motion for a preliminary injunction. Accordingly, in our view, the question of whether Carrier's implementation of its Intoxilyzer program constituted an impermissible change in the bargaining relationship between the parties was a question referred to this Board for adjudication. The Court's decision that there was no change in rules or working conditions, as those terms are used in Section 6 of the Railway Labor Act, was not binding on this Board which, of course, has jurisdiction only over those disputes arising under Section 3 of the Act. Consequently, the Court's pronouncement relied on by the Carrier herein does not bar us from deciding whether Carrier's implementation of the Intoxilyzer program was contrary to the prior custom and practice on this property.

The Carrier's argument that its use of the Intoxilyzer is no different in principle from traditional methods of observation under Rule G is simply not borne out by the record. Under Rule G, traits exhibited by an employee, such as an unsteady gait, flushed face, slurred speech, etc., provided the sole basis upon which the Carrier formed its belief that said employee was under the influence of alcohol. Based on these outward physical manifestations which were observed by the Carrier, that employee would then be charged with violating Rule G. However, under the Intoxilyzer program, no reason to suspect that an employee was under the influence of alcohol was even remotely involved. Rather, the program shifted the burden to all employees, those coming on duty as well as those already on duty, to satisfy the Carrier that they had not consumed alcohol.

That the Intoxilyzer is administered randomly and indiscriminately, and is compulsory on all employees regardless of whether Carrier has any reason to suspect them of consuming alcohol is acknowledged by the Carrier. The program as currently administered compels all employees to undertake affirmative conduct to demonstrate that they have no blood-alcohol in their body. That no parallel exists between this compulsory, random, and indiscriminate program; and that erstwhile method of observation used by the Carrier to detect intoxication is patently obvious to this Board.

Whether the Intoxilyzer itself is a determination of intoxication, as the Organization claims, or merely an additional method of observation, as the Carrier asserts, is not a crucial distinction in our view. Even assuming that the Intoxilyzer merely constitutes an additional method of observation – and this Board is by no means convinced of this – nevertheless the Intoxilyzer test is such a marked departure from previous methods of detection under Rule G that it clearly constitutes a change in the prior custom and practice used to detect intoxication on this property. Moreover, even were it shown that the Intoxilyzer is a more effective and objective method of enforcing the spirit and intent of Rule G as Carrier asserts, nevertheless it still constitutes a marked departure from the prior method used by Carrier to detect one's use of alcohol while either on duty or subject to duty.

In sum, the evidence convinces this Board that there is scant similarity between the former method of detecting use of alcohol by employees under Rule G, and the use of Intoxilyzer testing to make this determination. The Carrier obviously departed from the prior well-established practice, which practice was mutually accepted by the parties over a period in excess of 50 years, when it unilaterally implemented the Intoxilyzer program in September, 1980.

This Board wishes to make it manifestly clear that our decision here is predicated solely on the Carrier's unilateral change in the prior practice on this property which practice is, in our judgment, a binding condition of employment equally a part of the parties' collective bargaining agreement although not specifically expressed therein. Yet, in view of the extensive and well-reasoned arguments advanced by both the Organization and the Carrier, this Board feels obliged to address those arguments.

This Board agrees with the Carrier that the Organization's reliance on the Fourth Amendment's prohibition against unreasonable searches and seizures is clearly misplaced. The Fourth Amendment proscribes unreasonable searches and seizures conducted by governmental entities. It does not govern the conduct between a railroad and its employees. Accordingly, even were it shown that the Intoxilyzer program involved in this dispute constitutes an unreasonable search and seizure, nevertheless its implementation was certainly not barred by the Fourth Amendment to the United States Constitution.

The Organization's claim that the Intoxilyzer program violates the California Constitution poses a more vexing legal question, however. Article I, Section 1, of the California Constitution was amended in 1972. It provides as follows:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*" (Emphasis added).

Unlike the Fourth Amendment to the United States Constitution, the right of privacy granted by the California Constitution is not limited to state action. Rather, it

constitutes an inalienable right which may not be violated by *anyone*. This, quite naturally, imposes legal restraints on business as well as government activity. Thus, it appears to this Board that the Carrier is proscribed from denying any of its employees who reside in the State of California the inalienable rights guaranteed them by Article I, Section 1 of the California Constitution, including the right to privacy.

While the legal parameters of this constitutional right to privacy have not yet been resolved, the California Supreme Court has had two occasions to consider this constitutional right. Although the facts involved in both these decisions were quite dissimilar from the facts which gave rise to this dispute, nonetheless those decisions are instructive insofar as the right to privacy is a factor in this dispute.

In *White v. Davis,* 13 C.3d 757, a dispute involving the use of police undercover agents to monitor class discussions at a state university, the California Supreme Court explained the genesis of the privacy provision added to the State Constitution in 1972. The Court declared, in pertinent part, as follows:

> ". . . the moving force behind the new constitutional provision was a more focussed privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford individuals some measure of protection against this modern threat to personal privacy. . . . Several important points emerge from this election brochure 'argument,' a statement which represents, in essence, the only 'legislative history' of the constitutional amendment available to us. First, the statement identifies principal mischiefs at which the

amendment is directed; . . . (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; . . . second, the statement makes clear that the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest. Third, the statement indicates that the amendment is intended to be self-executing, i.e., that the constitutional provision, in itself, 'creates a legal and enforceable right to privacy for every Californian.' "

In *Porten v. University of San Francisco* 64 C.A.3d 825, the plaintiff sought damages against the University account of the University's claimed misconduct in disclosing to the State Scholarship and Loan Commission the grades plaintiff had earned in an out-of-state university before transferring to this University. The California Supreme Court reiterated the decision rendered in *White v. Davis* that the constitutional provision is self-executing; hence, it confers a judicial right of action on all Californians. It is obvious that in California one's privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone. The California Supreme Court in both *Porten* and *White* gave the privacy provision added to the State Constitution in 1972 a broad application.

Although the California Supreme Court stated that "the full contours of the new constitutional provision have not as yet even tentatively been sketched" (*White v. Davis* at page 773) nevertheless, in our view, the Organization in this proceeding has at least arguable [arguably] established a prima facie violation of the

California Constitution. Whether the California Supreme Court agrees with our conclusions; or whether it believes there exists a "compelling public interest" which justified implementation of Carrier's Intoxilyzer program are, quite naturally, questions that must ultimately be resolved by that Court. However, we have, parenthetically of course, expressed our views respecting the California Constitution inasmuch as this subject was joined in the proceeding before this Board.

While it is certainly not the province of this Board to suggest a mutually acceptable program for detecting the use of alcohol by Engineers on Carrier's property, it does appear that the Intoxilyzer program as implemented by the Carrier in September, 1980 [is] flawed in several material respects.

For instance, as observed heretofore in these *Findings*, the program is applied randomly and is administered indiscriminately to all employees regardless of whether the Carrier has reason to suspect them of violating Rule G. Since *any* registration on the machine will result in an employee not being allowed to assume duty, the program obviously interferes with the privacy of employees. Since consumption of but one alcoholic beverage would result in registration on the machine, the Carrier's program obviously imposes restrictions on employees' personal lives.

Additionally, the program as currently administered ignores statutory definitions of "under the influence." The vast majority of state statutes require law enforcement personnel to have probable cause to suspect that one is under the influence of alcohol before they are granted the right to require a compulsory alcohol test. Moreover, again in the vast majority of states, a reading of less than .05 percent alcohol creates a presumption that one is not intoxicated, unlike the Carrier's program which creates no such presumption.

Whether a collaborative program of enforcement and rehabilitation is preferrable to a punitive program is, of course, a question beyond the competence and authority of this Board. That less intrusive alcohol detection programs exist is quite clear, however. For instance, the airline industry has an extensive alcohol abuse program applicable to its pilots, which program is significantly less intrusive than Carrier's Intoxilyzer program.

This Board will not attempt to suggest an alcohol detection program that would address the concerns of both the employees and the Carrier. This would obviously be contrary to the jurisdiction we possess. All we have decided in this dispute is that the Intoxilyzer program unilaterally implemented by the Company in September, 1980 was contrary to the prior long-standing practice that existed on this property for detecting intoxication. Since that practice constituted a binding condition of employment which was just as much a part of the collective bargaining agreement between the parties as the written terms thereof, the Carrier had no right to unilaterally abrogate this prior practice. Clearly, any rights reserved to the Carrier under the contract to operate its business were restricted by this condition of employment.

Finally, this Board clearly recognizes the high degree of responsibility placed on the Carrier to assure the public and its employees that its business is operated safely. It is noteworthy, however, that even the National Transportation Safety Board, an agency that submitted several recommendations to the Carrier on how to improve its safety, never recommended that Carrier institute an Intoxilyzer program. Even the nation's airline industry, whose obligation to the public and to its employee's [sic] equals that imposed on the Carrier, has not required its pilots to prove their sobriety as a condition for assuming or remaining on duty.

In conclusion, it is the considered opinion of this Board that the Intoxilyzer program instituted by the Carrier in September, 1980, violated the collective bargaining agreement between the Carrier and the Organization. The Carrier is, accordingly, ordered to rescind this program forthwith.

AWARD: The Carrier violated the collective bargaining agreement with the Organization when it instituted its Intoxilyzer program in September, 1980. The Carrier is, accordingly, ordered to rescind this program forthwith.

DATED AT CHICAGO, ILLINOIS,
THIS 25th DAY OF June 1982

NATIONAL RAILROAD ADJUSTMENT BOARD
BY ORDER OF FIRST DIVISION

ATTEST:

/s/ Nancy J. xxxxx [sic]
Nancy J. xxxxx [sic]
Acting Executive Secretary

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*	:	CIVIL ACTION
vs.	:	FILED APRIL 28, 1987
CONSOLIDATED RAIL CORPORATION	:	NO. 86-2698

ORDER

AND NOW, this 27th day of April, 1987, upon consideration of the parties' cross-motions for summary judgment, it is hereby ORDERED that plaintiffs' complaint is DISMISSED for lack of subject matter jurisdiction. My decision is based on the following:

1. Plaintiffs Railway Labor Executives' Association, *et al.* seek to enjoin defendant Consolidated Rail Corporation (Conrail) from requiring employees represented by plaintiffs to undergo alcohol and drug testing. Plaintiffs claim Conrail's unilateral imposition of drug testing is contrary to the requirements of the Railway Labor Act, ("RLA") 45 U.S.C. §§151-188, and violates the Fourth Amendment of the United States Constitution.

2. Defendant argues that drug testing during return-to-work and periodic physical examinations involves a "minor dispute" under the RLA, and is subject to the mandatory and exclusive jurisdiction of the National Railroad Adjustment Board or a public law board. *See* 45 U.S.C. §153.

3. Plaintiffs, however, maintain that their claim is a "major dispute" subject to federal injunctive relief until the parties resolve the question in a collective bargaining agreement.

4. A major dispute arises when the contested conduct is not based on a collective bargaining agreement or on the long-standing practices or recognized customs of the parties. *See Elgin, Joliet & Eastern R.R. Co. v. Burley*, 325 U.S. 711, 723-24 (1945); *Brotherhood of Maintenance v. Burlington Northern R.R. Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986). *See also International Ass'n of Machinists v. Northwest Airlines*, 673 F.2d 700, 705-06 (3d Cir. 1982).

5. A minor dispute relates to the meaning or proper application of a particular provision of an existing agreement or long-standing practice. *See Brotherhood of Maintenance*, 802 F.2d at 1022.

6. A dispute is minor if the parties' agreement is reasonably susceptible of the contested interpretation or if the employer's action is arguably justified under the terms of the existing agreement. *Id.* Thus, the employer bears a "relatively light" burden of showing that its action is a minor change. *Id.*

7. Since its inception in 1976, Conrail has required all hourly employees to undergo periodic and return-to-duty physical examinations. These physicals have included urinalysis, but not a drug screen. *See* Stipulation ¶ 5, 6.

8. Under some circumstances, involving suspected drug use or prior drug problems however, Conrail has included a drug screen as part of a physical examination urinalysis. *See id.* ¶ 7.

9. Since February, 1987, Conrail has included a drug screen as part of all periodic and return-to-work physicals.

10. Therefore, Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy. The

union and Conrail always have shared a concern over drug and alcohol abuse, *see* Rule G, Stipulation ¶ 1, and since 1976 they have acquiesced in certain procedures to ensure an employee's fitness for the job. The parties always have recognized Conrail's right to remove from service employees who are unable to perform their duties safely. Conrail's drug testing program is a further refinement of that practice and is consistent with its right to ensure the safety of its operations.

11. Under these circumstances, Conrail's action constitutes a minor dispute, and for the reasons set forth in *Brotherhood of Maintenance*, 802 F.2d 1016; *Railway Labor Executives' Ass'n, et al. v. Southern Ry. Co.*, C.A. No. C86-1570 (N.D. Ga., Mar. 4, 1987); *Railway Labor Executives' Ass'n, et al. v. Norfolk & Western Ry. Co.*, C.A. No. 86-C-2064 (N.D. Ill., Feb. 2, 1987), I dismiss Counts I and II for lack of subject matter jurisdiction.

12. Although I could grant an injunction even in a minor dispute, this authority must be exercised only in rare cases where it is necessary to keep the controversy from growing into a major dispute. *See Brotherhood of Maintenance*, 802 F.2d at 1021-22. Plaintiffs have failed to show for purposes of this motion that this is a case calling for such exceptional relief.

13. Finally, I dismiss Count III (alleging a Fourth Amendment violation) because plaintiffs have failed to show for purposes of this motion that Conrail is a federal actor whose actions are subject to constitutional scrutiny. They claim that Conrail is a governmental enterprise because it was created by Congress and it relies heavily on federal funds. These arguments have been uniformly rejected by federal courts and I concur in their analysis. *See*,

e.g., *Morin v. Consolidated Rail Corporation*, 810 F.2d 720, 722-23 (7th Cir. 1987); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54-55 (2d Cir. 1985); *Anderson v. National Railroad Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984); *Wenzer v. Consolidated Rail Corp.*, 464 F. Supp. 643, 647-49 (E.D. Pa.), *aff'd*, 612 F.2d 576 (3d Cir. 1979). Indeed, the Supreme Court has observed that despite federal involvement on the board of directors, Conrail is basically a private enterprise. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974).

/s/ A. Scirica
Anthony J. Scirica, J.
April 28, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1289

RAILWAY LABOR EXECUTIVES' ASSOCIATION; AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, DIVISION OF BRAC; AMERICAN TRAIN DISPATCHERS ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; UNITED TRANSPORTATION UNION,

Appellants

v.

CONSOLIDATED RAIL CORPORATION

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 86-2698)

Argued November 3, 1987

Before: SLOVITER and BECKER, *Circuit Judges*, and COWEN, *District Judge**

(Opinion filed April 25, 1988)

Lawrence M. Mann (Argued)
Alper & Mann
Washington, D.C. 20001

Cornelius C. O'Brien, Jr.
O'Brien and Davis, P.C.
Philadelphia, PA 19102

Attorneys for Appellants

Dennis J. Morikawa (Argued)
Joseph J. Costello
Philadelphia, PA 19103

---

*Hon. Robert E. Cowen, United States District Court for the District of New Jersey, sitting by designation. Since the argument of this appeal, Judge Cowen has become a member of this Court.

Hermon M. Wells
Consolidated Rail Corporation
Philadelphia, PA 19104

Attorneys for Appellee

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

The issue presented by the Unions' appeal is whether the railroad's unilateral addition of a drug-screening component to its employees' medical examinations gives rise to a "minor" dispute under the Railway Labor Act over which the district court had no subject matter jurisdiction or to a "major" dispute which would entitle the parties to an injunction maintaining the status quo while they bargain over the change. This case concerns only the process pursuant to which drug screening may be introduced; it has nothing to do with whether drug screening is a good idea.

The district court concluded that the parties' prior practice with respect to medical examinations "arguably justified" the railroad's unilateral imposition of uniform drug screening and dismissed the Unions' action for want of jurisdiction. We will reverse.

I.

Background

A.

Facts

Plaintiffs, the Railway Labor Executives' Association, whose members head railway labor unions representing all crafts, and eighteen unions representing those crafts (hereinafter "Unions"), and defendant Consolidated Rail Corporation ("Conrail"), a railroad, have stipulated to the essential facts in this case. Since its formation in 1976, Conrail has required all employees to

undergo periodic physical examination at intervals varying between one and three years depending on the employee's age and job classification, and has required an examination upon the return to duty of all employees operating trains and engines who were out of service thirty days or longer and of all other employees out of service ninety days or longer "due to furlough, leave, suspension or similar causes." App. at 71. These examinations have routinely included urinalysis for blood sugar and albumin.

Conrail employees always have been subject to Rule G or its equivalent, an industry-wide rule, which prohibits the use or possession of "intoxicants, narcotics, amphetamines or hallucinogens" by employees on duty or the use of such substances by employees subject to duty, and which requires employees under medication to be certain that their safe performance of duty is not compromised. This rule has been enforced in the past principally by supervisory observation.

Conrail has routinely used drug screening urinalysis as part of the return-to-duty medical examination of any employee previously taken out of service because of a drug-related problem, and in both periodic and return-to-duty examinations, when the examining physician suspected drug abuse. In applying Rule G, Conrail "encourag[ed] employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine, or other diagnostic tests." *See* App. at 70; *cf. Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d 1087, 1089 (9th Cir. 1988) (railroad's employee suspected of drug use could avoid suspicion by voluntarily submitting to urinalysis); *Brotherhood of Maintenance of Way Employees v. Burlington Northern R. R. Co.*, 802 F.2d 1016, 1018 (8th Cir. 1986) (Arnold, J., for a unanimous court, concurring in part) (same).

In February 1986, the regulations of the Federal Railway Administration on "Control of Alcohol and Drug

Use in Railroad Operations" became effective. 49 C.F.R. §219 (1987). These regulations require post-accident drug screening by urinalysis, breathalizer and/or blood testing for all employees covered by the Hours of Service Act, 45 U.S.C. §61-66 (1982), *i.e.*, for operating employees.[1] Employees reasonably suspected of being under the influence of a prohibited substance may also be tested if they are involved in an operating rule violation or contribute to an accident. The application of these regulations to covered employees is not at issue on this appeal.

On February 20, 1987, Conrail announced its unilateral decision to include a drug screen as part of the urinalysis in all periodic and return-to-duty examinations, and in any special examinations deemed necessary by the physician after a return from a drug-related absence from duty. The Unions filed suit in district court alleging that Conrail's action violated Section 6 of the Railway Labor Act, 45 U.S.C. §156 (1982), and the Fourth Amendment's prohibition of unreasonable search and seizure and sought to enjoin Conrail from instituting the drug testing.

All parties moved for summary judgment. The district court, based on the facts set forth above, concluded that "Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy." *See Railway Labor Executives' Ass'n v. Conrail*, No. 86-2698, slip op. at 3 (E.D. Pa. April 28, 1987). It therefore found the dispute to be a "minor" one and dismissed the counts of the complaint

1. The Hours of Service Act applies to any "individual actually engaged in or connected with the movement of any train," but not to all railroad employees. 45 U.S.C. §61(b)(2). The Court of Appeals for the Ninth Circuit has recently held the Federal Railway Administration regulations to be unconstitutional under the Fourth Amendment. *See* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988). That issue is not before us.

based on the Railway Labor Act. The court also dismissed the Fourth Amendment claim on the ground that Conrail is not a government enterprise. *Id.* at 3-4. The Unions appeal only the order dismissing the Railway Labor Act counts.

The district court's conclusion that the drug-testing program constitutes a minor dispute is a legal determination. *Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d at 1089; *see Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747, 755 (3d Cir. 1977); *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 543-45 (3d Cir. 1974). *But see Railway Labor Executives' Ass'n v. Norfolk and Western Ry. Co.*, 833 F.2d 700, 707 (7th Cir. 1987). Because the district court dismissed the claims pursuant to the undisputed facts, its order, akin to a grant of summary judgment, is subject to plenary review. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *cf. Medical Fund-Philadelphia Geriatric Center v. Heckler*, 804 F.2d 33, 36 (3d Cir. 1986) ("dismissal of a complaint for lack of jurisdiction . . . raises a question of law subject to plenary review").

B.

Major and Minor Disputes

This court has recently had occasion to review the statutory background of the Railway Labor Act in *Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Co.*, No. 87-3797 (3d Cir. April 8, 1988). Therfore, we will only briefly discuss the provisions relating to major and minor disputes insofar as necessary to an understanding of the issue before us.

The Railway Labor Act ("RLA"), 45 U.S.C. §151 *et seq.*, was passed in 1926 to facilitate labor peace in the railroad industry, then the backbone of the American transportation system. *See* H.R. Rep. No. 328, 69th Cong., 1st Sess. 1-3 (1926) [hereinafter *1926 House*

Report]; *Baker v. United Transp. Union*, 455 F.2d 149, 153-54 (3d Cir. 1971). In an unprecedented cooperative process, the Act was drafted by negotiators for railroad management and labor and presented to Congress as, esscntially, a finished product. *See 1926 House Report* at 1, 3. In its original form, the Act did not provide compulsory arbitration for any claim; it worked instead to prevent strikes and lockouts by funneling disputes into "purposely long and drawn out [procedures], based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 246 (1966); *see Elgin, Joliet & Eastern R.R. v. Burley*, 325 U.S. 711, 725-27 (1945).

From the beginning, the Act made a distinction between disputes arising from grievances and the interpretation of a contract ("minor" disputes), on the one hand, and disputes arising from changes in pay rates, work rules and working conditions ("major" disputes), on the other. *See* Railway Labor Act, Pub. L. No. 257, §§3, First, 5(a)-(b), 6, 44 Stat. 577, 578-82 (1926); *see also Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R. Co.*, 353 U.S. 30, 35 (1957). Originally, minor disputes could be submitted to binding arbitration by "adjustment boards" composed of equal representatives of labor and management voluntarily established by the parties. The inability of the parties to agree to such boards and the deadlock in thousands of disputes before boards led Congress to amend the Act in 1934 to create the National Railroad Adjustment Board before which either side in a minor dispute can submit the issue to compulsory arbitration if the parties have not agreed on their own arbitrators. Railway Labor Act, ch. 691, §23, 48 Stat. 1185, 1189-93 (1934); *Trainmen*, 353 U.S. at 39; *Elgin*, 325 U.S. at 726. *See generally* Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 574-76 (1937). The carrier is not barred in minor disputes from introducing

the disputed change during the pendency of the arbitration proceedings. *See* 45 U.S.C. §153; *Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747, 754 n.6 (3d Cir. 1977); *cf.* 45 U.S.C. §156.

In contrast, parties to a major dispute have always been required to proceed through a more extensive mediation and conciliation mechanism as specified by sections 5 and 6 of the Act. 45 U.S.C. §§155-56; *see 1926 House Report* at 3-5; *Elgin*, 325 U.S. at 725-26. During this process, the parties are entitled to an injunction, if necessary, to preserve the status quo. *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 543 (3d Cir. 1974) (per curiam).[2]

The legislative history makes clear that labor's acquiescence to the RLA's procedure, including management's right to introduce changes in "minor" dispute situations, was dependent on the general understanding that "minor" disputes, with their attendant compulsory arbitration, were to be limited to "comparatively minor" problems, "represent[ing] specific maladjustments of a detailed or individual quality," *Elgin*, 325 U.S. at 724, in contrast to the "large issues about which strikes ordinarily arise," *id.* at 723-24. *See Trainmen*, 353 U.S. at 39 (general understanding was that compulsory arbitration covered only a "limited field"). *See generally* Garrison, *supra*, at 586-91 (describing typical minor disputes).

The classic explanation of the distinction between major and minor disputes appears in *Elgin*. Major disputes are said to arise "where there is no [collective

2. There are four, narrowly-cabined situations in which a district court may have subject-matter jurisdiction in a minor dispute despite non-exhaustion of the arbitration procedures. Childs v. Pennsylvania Fed. Bhd. of Maintenance of Way Employees, 831 F.2d 429, 437-38 (3d Cir. 1987). One of them, applicable "when resort to administrative remedies would be futile," Sisco v. Conrail, 732 F.2d 1188, 1190 (3d Cir. 1984), has been raised by the Unions here. Because of our disposition of the case, we do not reach this question.

bargaining] agreement or where it is sought to change the terms of one. . . . They look to the acquisition of rights for the future, not the assertion of rights claimed to have vested in the past." 325 U.S. at 723. Minor disputes arise where an existing agreement is being applied, "a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Id.*; *accord Trainmen*, 353 U.S. at 33 ("These are controversies over the meaning of an existing collective bargaining agreement, generally involving only one employee.")

We have adopted the following test to assist in determining whether the dispute is a minor one:

> [I]f the disputed action of one of the parties can "arguably" be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not "obviously insubstantial", the controversy is [a minor dispute] within the exclusive province of the National Railroad Adjustment Board.

Local 1477 United Transp. Union v. Baker, 482 F.2d 228, 230 (6th Cir. 1973), *quoted in United Transp. Union v. Penn Central*, 505 F.2d at 544; *accord, e.g., Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d 1087, 1091 (9th Cir. 1988). For this purpose, it is not necessary that the terms of a collective bargaining agreement governing relations under the Act be embodied in a written document; instead they may be inferred from habit and custom. *See Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142 (1969); *Brotherhood of Locomotive Eng'rs v. Burlington Northern*, 838 F.2d at 1091-92; *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986) (Arnold J., for a unanimous court, concurring).

In this case, the district court found, and the parties do not dispute, that Rule G and the medical examination policy, although not incorporated in the parties' written agreement, constitute implied-in-fact contractual terms. Thus, we reach the principal issue: whether Conrail's imposition of a drug screen was an interpretation of one or both of these agreements thereby constituting it as a minor dispute under 45 U.S.C. §153, First, (i), which it could institute unilaterally, or whether its attempt to impose such a drug screen was a new term constituting a major dispute under 45 U.S.C. §152, Seventh, over which it must bargain.

III.

Discussion

The Unions argue that the incorporation of a drug-screen test as an element of the urinalysis required in all periodic and return-to-duty physical examinations is a change in the existing rules and working conditions. They argue that the working conditions had not previously encompassed testing employees for drugs without some particularized suspicion or past medical problem and therefore the across-the-board testing is a major dispute within the jurisdiction of the district court. They also argue that the drug-screen represents a new method of enforcing Rule G, which had been enforced primarily by supervisory observation. Such a unilateral change in the method of enforcement, they contend, constitutes a major dispute.

Conrail responds that the addition of drug screening is arguably justified by the parties' long-standing implied-in-fact agreement authorizing Conrail to test the urine of employees to identify workers who are medically unfit for duty. It claims that the new screening is within its prerogative to modify its medical standards and procedures as a result of advances in medical science and medical technology. Conrail contends that because

there was no practice of requiring some medical evidence of drug usage prior to urinalysis as part of its routine medical examination, its new program which adds the drug-screen component to such urinalysis is not a significant departure from past practice.

A.

Three other courts of appeals have considered the same or similar drug-testing issues under the RLA, with varying results and rationales. In a pair of cases, the Ninth Circuit denominated as major disputes the use of drug-detecting dogs, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1102 (9th Cir. 1988) *(Dog Search Case)*, and mandatory urinalysis testing of crewpeople implicated in "human-factor" accidents or operating-rule violations, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087 (9th Cir. 1988) *(Chemical Testing Case)*, as a means of enforcing Rule G.

The majority's decision in the *Chemical Testing Case* was based chiefly on the "critical differences between the old method and the new method: the old method of enforcing Rule G was voluntary, and required particularized suspicion; the new method is mandatory, and requires only generalized suspicion." *Id.* at 1092. It noted that the enforcement method employed in the past — the supervisor's "observing an employee's gait, breath, odor, slurred speech, or bloodshot eyes — was non-intrusive." *Id.* It rejected the railroad's claim that the union, by acquiescing "in Rule G's enforcement by sensory surveillance can be said to have agreed to allow [the railroad] to implement *any* procedure beyond sensory surveillance so long as the procedure is brought into play by . . . an 'objective triggering event.' " *Id.* The court also noted that it had recently held that the Fourth Amendment was violated by Federal Railway Administration regulations which imposed a similar testing

program based only on generalized suspicion arising from an accident. *Id.* at 1093 (citing *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988)). The court ruled that it would construe the implied agreement with the railroad in enforcing Rule G as containing the same expectation of privacy as to the employer as the worker had as to the government. *Id.* at 1093. Because the new mandatory urine testing program changed the working conditions governed by the bargaining agreement, it was "by definition" a major dispute. *Id.*

In the *Dog Search Case*, involving the use of trained dogs to randomly search for drugs, the court again relied on the fact that previous practice under Rule G had always required "a triggering event", the perception of facts by an official suggesting that a specific employee was under the influence of alcohol or drugs. 838 F.2d at 1105. Furthermore, the court construed the parties' implied agreement as directed to whether an employee was under the influence of a prohibited substance, unlike the newly imposed search which was directed to detecting possession to prevent future use. *Id.*

Railway Labor Executives Association v. Norfolk & Western Railway Co., 833 F.2d 700 (7th Cir. 1987), presented the Seventh Circuit with issues almost identical to those we confront here. As here, the railroad added a drug screen to the urinalysis that had been a routine element of the medical examination. Rejecting the unions' argument that the drug-screening intruded into employees' conduct outside of the workplace, the court held that "[t]he addition of a drug screen as a second component of the urinalysis previously required of all employees does not constitute such a drastic change in the nature of the employees' routine medical examination or the parties' past practices that it cannot arguably be justified by reference to the parties' agreement." *Id.* at 706. The court of appeals rejected the unions' argument that the testing was designed to

enforce Rule G, holding that the district court's factual finding "that [the railroad] had not made any unilateral changes in the enforcement of Rule G" was not clearly erroneous. *Id.* at 707.

There were two separate testing issues before the Eighth Circuit in *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co.*, 802 F.2d 1016 (8th Cir. 1986). One, which is not at issue here, concerned the railroad's institution of post-incident testing to enforce Rule G. The court unanimously concluded that although the ground rules between the parties governing Rule G enforcement required suspicion of impairment to justify a test, the urinalysis " 'of the individual crew member having . . . exclusive responsibility for the action triggering the incident' " or other crew members "only when individual responsibility is not clear" satisfied that suspicion requirement and would not be "such a serious departure from past practice as to give rise to a major dispute." *Id.* at 1023 (quoting railroad policy).

The court divided on the second issue, the railroad's institution of a drug screen as part of its periodic and return-to-duty medical exams. Two members of the court tersely reversed the district court's finding that the medical examination screening presented a major dispute. The majority noted that the union did not deny that the agreement allowed medical testing to identify workers who were unfit for duty, and stated that consequently, "all that is involved in the parties' dispute is the extent to which the urinalysis component of these examinations may be refined in order to predict safe employee performance." *Id.* at 1024; *see also International Ass'n of Machinists, District Lodge 19 v. Southern Pacific Transp. Co.*, 105 LRRM 2046 (E.D. Cal. 1980) (use of alcohol breath test a minor dispute). Judge Arnold, in dissent, stressed that regardless of whether the testing was characterized as a medical or disciplinary matter, the medical testing program could result in

an employee's being fired without any prior suspicion of drug use. 802 F.2d at 1025 (Arnold, J., dissenting in part). "This new examination is universal and indiscriminate, in the sense that it is imposed without regard to any degree of suspicion that the employee is working while impaired." *Id.* at 1024. Such a change, he argued, was too significant to go forward without negotiations between the parties.

B.

The absence of any uniformity in interpretation by the other courts reinforces our responsibility to make an independent analysis of the applicable law to the undisputed facts. When a court holds that an existing agreement, explicit or implied, arguably justifies a new practice, the court has determined that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue. In this case, we must determine whether the existing agreement arguably admits of an implied term encompassing the new drug screening. *See Chemical Testing Case*, 838 F.2d at 1092-93; *cf. Transportation-Communication Employees Union v. Union Pacific R.R. Co.*, 385 U.S. 157, 160-61 (1966) ("In order to interpret [a collective bargaining] agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements.")

The district court held that the new testing was arguably within the terms of the existing medical examination agreement. We reach a contrary legal conclusion because the undisputed terms of the implied agreement governing medical examinations cannot be plausibly interpreted to justify the new testing program.

Under the stipulation agreed to by the parties, use of a drug screen was included as part of the urinalysis in

return-to-duty physical examinations "when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs." App. at 71. It was included as part of the periodic physical examination only in the latter situation, "when, in the judgment of the examining physician, the employee may have been using drugs." App. at 71-72.

Conrail argues that because it has been conducting drug-screen urinalysis from time to time since 1976, there is an arguable contractual basis for its imposition of drug screening as part of its routine medical examinations.[3] This argument overlooks what to us is the determinative distinction between the old and new practice: before, drug screening was included only when there was particularized cause and not as part of the routine urinalysis. The fact that the prior agreement encompassed drug screening only in instances where there was cause and limited the routinely administered urinalysis to tests for blood sugar and albumin persuades us to reject Conrail's argument that the medical testing agreement justifies testing without cause.

If we were to accept Conrail's argument that its prior medical testing justified the drug screen, it would expand the scope and effect of medical testing beyond that

3. In 1984, Conrail issued a new medical standards manual requiring a drug screen to be carried out in connection with all periodic examination urinalyses. The mandated testing was performed in only one of its four administrative regions, and was discontinued for budgetary reasons after six months. Conrail does not contend that this period of limited uniform testing without the apparent knowledge or agreement of the Unions worked a change in the parties' general agreement governing medical testing. *See generally* Baker v. United Transp. Union, 455 F.2d 149, 156 (3d Cir. 1971) (practice became part of parties' agreement where "the railroad has engaged in a certain activity over a sufficient period of time for the union to become aware of it and react accordingly if it objects").

of Rule G, the disciplinary rule aimed specifically at substance abuse. Under Rule G, only employees who are impaired while on the job or on call may be disciplined, whereas an employee whose drug use is detected through the new medical testing program may be fired even though s/he was never found to be impaired while at work or subject to duty.

Ultimately, Conrail's argument rests on the premise that testing urine for cannabis metabolites is no different in kind from testing urine for blood sugar. This ignores considerable differences in what is tested for and the consequences thereof. Employee drug testing is a controversial issue throughout the railroad industry and beyond. *See, e.g., Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (school bus attendants); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987) (Customs Service employees), *cert. granted*, 108 S. Ct. 1072 (1988); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) (race track jockeys), *cert. denied*, 107 S. Ct. 577 (1986); *Transport Workers' Union of Philadelphia v. Southeastern Pennsylvania Transp. Authority*, 678 F. Supp. 543 (E.D. Pa. 1988) (municipal transport workers); *Association of Western Pulp and Paper Workers v. Boise Cascade Corp.*, 644 F. Supp. 183 (D. Or. 1986) (paper mill workers); *Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 510, N.E.2d 325, 517 N.Y.S.2d 456 (1987) (school teachers). The practice poses serious ethical and practical dilemmas as well. *See, e.g., Substance Abuse in the Workplace: Readings in the Labor-Management Issues* (R. Hogler ed. 1987) [hereinafter *Substance Abuse*] (collecting commentary). We regard it as particularly significant that the General Counsel of the National Labor Relations Board has taken the position that drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the National Labor Relations

Act. *See* National Labor Relations Board, Office of the General Counsel Mem. GC 87-5 (Sept. 8, 1987), *reprinted in* Daily Labor Report (BNA), No. 184 at D-1 (Sept. 24, 1987) ("When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination.")

The function of bargaining over major disputes is obviously to reach agreement on terms and conditions which have not yet been addressed. Conrail cannot point to any existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed. *Cf. Shoemaker*, 795 F.2d at 1140, 1144; Rothstein, *Screening Workers for Drugs*, in *Substance Abuse*, *supra*, 115, 116-22. We search the past practices of the parties in vain for any indication of an agreement on these key matters. It follows that the agreement governing prior medical examinations cannot be strained to include, even arguably, an agreement to routinely perform a drug screen.

C.

The Unions also argue that the new testing is a change in working conditions in that it represents a change in the method of enforcing Rule G, which is itself a working condition. Conrail denies that its drug testing is designed to enforce Rule G, but argues that even if it were, the implementation of a new procedure to enforce Rule G would be a minor dispute. As we noted before, the only court of appeals to reach the issue of the characterization for RLA purposes of a change in the method of enforcement of Rule G ruled that it raised a major dispute. *See Chemical Testing Case*, 838 F.2d at 1092-93; *see also Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d at

1024-25 (Arnold, J., dissenting in part). However, in light of Conrail's disavowal of Rule G as a justification for the newly imposed drug screen and our conclusion that the existing medical policy did not arguably justify the drug screen, we need not reach the Rule G enforcement issue.

IV.

Conclusion

As we have explained above, Conrail's addition of drug screening to the urinalysis examination of employees as to whom Conrail has no particularized suspicion of drug use changes the terms and conditions governing the employment relationships. It therefore constitutes a major dispute which Conrail cannot impose unilaterally. Instead, the RLA requires that the parties must bargain under the prescribed procedure.

In so holding, we do not minimize the serious drug and alcohol problem in the transportation industry. *See, e.g.*, De Rosa, *Alcohol Problems in the Railroad Industry*, in *Substance Abuse*, *supra*, 29, 29 (reporting estimate that some 25 percent of railroad workers drink on duty or while subject to duty); *New Regulations to Control Substance Abuse in the Transportation Industry*, in *id.* at 31 (alcohol and drug abuse responsible for 37 deaths, 80 injuries and $34 million in property damage between 1975 and 1985). We also note that the Unions have stated in their brief that they "yield to no one in abhorence [sic] of alcohol or drug use in employment, or in the desire to purge the industry of their adverse effects." Appellants' Brief at 4. They will have an opportunity to effectuate this desire at the bargaining table.

The order of the district court dismissing the complaint for lack of subject matter jurisdiction will be reversed and the case remanded for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

STATUTORY PROVISIONS OF THE RAILWAY LABOR ACT

§152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such places of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 bidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provision of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with

the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper

court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation

fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than

that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after

such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section

shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers

and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however*, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil

suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed 'a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board; *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court

shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the

compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority

conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional

boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be

compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

§156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

No. 88-1

In the Supreme Court of the United States

October Term, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,
Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONER

Harry A. Rissetto
1800 M Street, N.W.
Washington, D.C. 20036

Dennis J. Morikawa*
Michael J. Ossip
Sarah A. Kelly
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5513

Bruce B. Wilson
Jeffrey H. Burton
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Attorneys for Petitioner Consolidated Rail Corporation

**Counsel of Record*

Of Counsel:

MORGAN, LEWIS & BOCKIUS

November 28, 1988

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

51 pp

QUESTION PRESENTED

Whether Conrail's addition of a drug test to the urinalysis component of its fitness for duty medical examinations gave rise to a minor dispute under the Railway Labor Act where Conrail has had a longstanding, unchallenged practice of performing such medical fitness examinations which have included urinalyses.

PARTIES TO PROCEEDINGS BELOW
AND RULE 28.1 STATEMENT

Petitioner is Consolidated Rail Corporation. Respondents are Railway Labor Executives' Association; American Railway and Airway Supervisors Association, Division of BRAC; American Train Dispatchers Association; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express and Station Employees; Brotherhood Railway Carmen of the United States and Canada; Hotel Employees & Restaurant Employees International Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Longshoremen's Association; National Marine Engineers' Beneficial Association; Seafarers International Union of North America; Sheet Metal Workers International Association; Transport Workers Union of America; and United Transportation Union.

Petitioner has no parent corporation(s). It has the following affiliates and non-wholly-owned subsidiaries:

The Akron & Barberton Belt Railway Company
Albany Port Railway Corporation
American Casualty Excess Insurance, Ltd.
The Belt Railway Company of Chicago
Chicago & Western Indiana Railway Company
Indiana Harbor Belt Railroad Company
Calumet Western Railway Company
The Lakefront Dock and Railroad Terminal Company
The Monongahela Railway Company
Nicholas, Fayette & Greenbrier Railroad Company
Peoria & Pekin Union Railway Company

Pittsburgh Chartiers & Youghiogheny Railway Company
Railroad Association Insurance, Ltd.
Trailer Train
Calpro Company
Railbox Company
Trailer Train Finance, N.V.
Transportation Data Xchange, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS – *(Continued)*

TABLE OF AUTHORITIES

CASES

Cases:

No. 88-1

In the Supreme Court of the United States

October Term, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,
Respondents

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR PETITIONER

Petitioner Consolidated Rail Corporation ("Conrail") submits the following brief on the merits pursuant to the Court's grant of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on April 25, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 845 F.2d 1187 (3d Cir. 1988), and is reproduced in the Joint Appendix ("JA") at JA-112 to JA-130. The Order of the United States District Court for the Eastern District of Pennsylvania is unreported and is reproduced in the Joint Appendix at JA-108 to JA-111.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1) (1982). The Court granted certiorari to review this matter on October 3, 1988.

STATUTE INVOLVED

Sections 2, 3 and 6 of the Railway Labor Act, 45 U.S.C. §§152, 153 and 156 (1982), are set forth in the Joint Appendix at JA-131 to JA-151.

STATEMENT OF THE CASE

I. Conrail's Fitness For Duty Medical Program.

Since its inception in 1976,[1] Conrail has maintained a fitness for duty medical program, the purpose of which is to determine if employees are medically qualified to perform their jobs safely. Under the program, employees are routinely required to submit to periodic and return-to-duty physical examinations based on age and job classifications,[2] and following furloughs and certain extended absences from work. Periodic physical examinations have been required of certain classifications of

1. Consolidated Rail Corporation was created by the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§701-797m (1987), as a "common carrier by railroad" and not "an agency or instrumentality of the Federal government." 45 U.S.C. §741(b) (1987). Pursuant to the Act, on April 1, 1976 Conrail was conveyed the rail properties of six bankrupt northeast rail carriers including the Penn Central Transportation Company, the Erie Lackawanna Railroad, the Reading Railroad, the Central Railroad of New Jersey, the Lehigh Valley Railway, and portions of the Lehigh & Hudson River Railroad. *See generally* Perritt, *Ask and Ye Shall Receive: The Legislative Response to the Northeast Rail Crisis,* 28 Villanova Law Review 271 (1983).

2. Periodic physical examinations ordinarily are required of employees working in crafts covered by the Hours of Service Act, 45 U.S.C. §§61-64b (1986), and include train and engine crews, yard crews (including switchmen), hostlers, block operators, dispatchers and signalmen. Conrail employees not covered by the Hours of Service Act but who are required to submit to periodic and return-to-duty physical examinations include road foremen of engines, trainmasters, crane or derrick operators, machine operators, highway vehicle operators, inspection and repair foremen and police officers. (JA-73 to JA-75).

employees every three years up to and including the age of 50 and every two years thereafter.[3] (JA-73). Return-to-duty physical examinations are required of train and engine service employees who have been out of service for at least 30 days due to furlough, leave, suspension or similar causes. All other employees who have been out of service for at least 90 days are also required to undergo physical examinations upon returning to duty. (JA-74 to JA-75). Return-to-duty follow-up examinations are within the discretion of Conrail's Department of Health Services which determines whether an employee's condition justifies requiring further examinations to evaluate his or her continuing fitness to work after a return-to-duty. (JA-74).

Since at least 1976, Conrail has, without any bargaining or request to bargain by the Respondent unions (hereinafter "Unions"), unilaterally established, modified and changed its medical fitness standards including the diagnostic screening techniques which have been utilized in medical examinations conducted pursuant to those standards. Such changes have, for example, been in response to advances in medical science and reflect significant improvements in the development of diagnostic techniques.[4] These medical examinations have

3. There are certain exceptions to this rule. The state of New Jersey for example requires annual periodic examinations of locomotive engineers. Conrail has also required operators of over-the-highway vehicles to be examined every two years, and employees engaged in the preparation or serving of food, division superintendents and supervisors in the Systems Operations Bureau to be examined annually. (JA-73 to JA-75).

4. For example, for many years Conrail's Medical Department relied upon the voice of the examining physician to conduct employee hearing tests. The Department changed its procedures to provide for the use of audiometers to conduct such tests. The Medical Department now uses spirometric examinations to measure lung capacity using computers rather than the calibrated bellows which were used by railroads in the past. (JA-67). Conrail

routinely included a urinalysis for albumin and blood sugar. However, a portion of the urine sample was also tested for the presence of illicit drugs when, in the judgment of the examining physician, the employee may have been using drugs or when the employee had been previously taken out of service for a drug-related problem. (JA-69). Each employee whose urine was to be screened for the presence of drugs was always told before providing a urine specimen that such testing would be conducted. (JA-39).

Since 1976,[5] employees who have undergone a

NOTES *(Continued)*
has also revised its techniques for conducting electrocardiograms and visual examinations based on advances in medical technology. These modifications have been made without any consultation with the Unions. (JA-67).

5. While the historical focus of this litigation begins with the creation of Conrail in 1976, medical examinations and fitness for duty requirements have a long history in the railroad industry. *See* International Congress on Hygiene and Demography, "Prevention of Accidents, Examination, Education, and Care of Employees of Common Carriers" in *Transactions*, Vol. 5 pt. 1, 1912, pp. 141-45 Wash., DC, GPO 1913; *Minneapolis St. Paul & Sault Ste. Marie Ry. v. Rock*, 279 U.S. 410, 414 (1929)("Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations."); *Baker v. United Transp. Union*, 455 F.2d 149 (3d Cir. 1971)(involving the railroad's right to move the location of physical examinations). In recent years, the Federal Railroad Administration ("FRA") has discussed the importance of including drug tests as part of fitness for duty determinations. Further, the FRA has noted that "regular inclusion of drug screens (including a check for alcohol) could powerfully augment the diagnostic tools available to examining physicians and focus the attention of physicians on signs of abuse that, standing alone, might not be adequate to support a diagnosis. That is, a positive test could be used as a part of the overall medical evaluation." Department of Transportation, Federal Railroad Administration, Control of Alcohol and Drug Use in Railroad Operations, 49 Fed. Reg. 24,252 at 24,279 (proposed June 12, 1984). On November 21, 1988, the Department of Transportation issued regulations governing drug testing of employees involved in the railroad, airline and trucking industries. In

periodic, return-to-duty or follow-up physical examination and who have failed to meet Conrail's established medical standards have been routinely held out of service without pay until the condition has been corrected or eliminated. Thus, for example, employees have been disqualified from service until their vision was corrected or their blood pressure or elevated blood sugar reduced in order to meet the standards set by the Conrail Medical Department. (JA-70).

On April 1, 1984 Conrail issued a new Medical Standards Manual which provided that a drug screen would be included as part of the urinalysis component of all periodic, return-to-duty and follow-up medical examinations. (JA-69). The policy was openly applied in Conrail's Eastern Region (one of four operating regions) for a six-month period but discontinued for budgetary reasons. (JA-69). Thereafter, Conrail returned to its original policy of including drug screens as part of the urinalysis at the discretion of the examining physician.

The heightened importance of medical fitness for duty determinations was brought tragically to national attention by the incident which occurred at Chase, Maryland on January 4, 1987 when an Amtrak passenger train collided with Conrail locomotives killing 16 persons and injuring 174 others. The subsequent determination that the Conrail engineer and brakeman had been using marijuana prior to the accident caused Conrail to focus critical attention on its medical fitness for duty examinations.[6] Shortly thereafter, on February

discussing its regulations on random testing of covered railroad employees, the FRA noted: "[a]ll major railroads have medical examination programs and there is considerable merit to inclusion of drug screens, particularly in a return-to-work context." Department of Transportation, Federal Railroad Administration, Random Drug Testing; Amendments to Alcohol/Drug Regulations, 53 Fed. Reg. 47,102 at 47,119 (1988).

6. After an extensive investigation following the Chase accident, the National Transportation Safety Board concluded that it

20, 1987, Conrail announced that a drug screen would be conducted on urine samples collected as part of all periodic, return-to-duty and follow-up physical examinations. Under the policy, employees who test positive for illegal drugs are medically disqualified from performing service but may return to work by providing a negative drug test at any time within a 45-day period from the date of disqualification. (JA-70). In addition, an employee whose first test is positive is given an opportunity to be evaluated by Conrail's Employee Counseling Service. If the evaluation reveals evidence of possible addiction and the employee agrees to enter an approved treatment program, he or she is given an extended period of 125 days to provide a negative drug test. (JA-70).

Separate and distinct from medical fitness for duty determinations, Conrail has always enforced a disciplinary rule known as "Rule G" which prohibits the use or possession of "intoxicants, narcotics, amphetamines or hallucinogens" by employees on duty or the use of such

NOTES *(Continued)*

had been caused by the engineer's use of marijuana. Department of Transportation, Federal Railroad Administration, Railroad Operating Rules; Random Drug Testing Program, 53 Fed. Reg. 16,640 (proposed May 10, 1988). Dramatic evidence of the tragic consequences of drug and alcohol abuse in the railroad industry is recited in the Brief of the Department of Transportation in *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.) *cert. granted*, U.S. 108 S.Ct. 2033 (1988), and the petition for writ of certiorari in *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed* (U.S. April 1, 1988) (No. 87-1631). The FRA has noted that it has ". . . long encouraged railroads to test employees (for drugs) in the context of its medical qualification programs. . . ." Department of Transportation, Federal Railroad Administration, Railroad Operating Rules; Random Drug Testing Program, 53 Fed. Reg. at 16,647. *See also* Department of Transportation, Federal Railroad Administration, Random Drug Testing; Amendments to Alcohol-/Drug Regulations, 53 Fed. Reg. 47,102-47,105 (1988).

substances by employees subject to duty. The Rule further requires employees under medication to be certain that such use will not affect the safe performance of their duties. Conrail does not use drug screening urinalysis to enforce Rule G. Rather, it has traditionally relied upon two methods of detecting Rule G violations: supervisory observation and encouraging employees who are suspected of substance abuse to voluntarily agree to undergo blood or urine tests. A violation of Rule G results in automatic discipline. (JA-51 to JA-52). This is to be contrasted with medical disqualifications based on a positive drug test which do not result in discipline unless the employee subsequently fails or refuses to abide by instructions of the Medical Department.[7]

II. Decisions of the Courts Below.

On May 7, 1986, the Unions filed suit in the United States District Court for the Eastern District of Pennsylvania seeking to enjoin Conrail from utilizing drug screens as part of the urinalysis component of its medical fitness for duty examinations. Although they claimed that the addition of the drug screens violated the Railway Labor Act ("RLA"), the Unions never served Conrail with a notice seeking to bargain over the addition of the drug screen.

Based on a joint stipulation of the parties and uncontradicted facts in the form of affidavits, answers to interrogatories and responses to requests for production of documents, the district court rejected the Unions' contention that the addition of a drug test to the urinalysis component of Conrail's existing medical examination program constituted a "new" policy which required Conrail to bargain with the Unions prior to its implementation. In its order dismissing the complaint,

7. *See, e.g., Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700, 707-08 (7th Cir. 1987).

the district court noted that Conrail had always required all hourly employees to undergo periodic and return-to-duty physical examinations including urinalyses, and that drug tests had in the past been used by Conrail where drug use was suspected or where prior drug problems existed. (JA-109). The district court found that the Unions had acquiesced in Conrail's procedures to ensure an employee's fitness for the job because the Unions had always recognized Conrail's right under the medical policy to remove from service employees who were unable to perform their duties safely. (JA-109 to JA-110). The district court also found that Conrail's drug testing program was simply a "further refinement" of that practice and was consistent with its right to ensure the safety of its operations. (JA-110). On the basis of these findings, the district court held that Conrail's position regarding the addition of the drug screen was arguably justified by its past practice related to fitness for duty determinations and therefore gave rise to a "minor" dispute under the Railway Labor Act. (JA-110).

On appeal, the United States Court of Appeals for the Third Circuit reversed the district court and remanded the case for further proceedings consistent with its opinion. (JA-130). The Third Circuit recognized that two prior cases, *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987) and *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986), both dealing with facts virtually identical to those presented in this case, had concluded that they presented "minor disputes" subject to the exclusive jurisdiction of the National Railroad Adjustment Board ("NRAB"). Nevertheless, the Third Circuit concluded that "the absence of any uniformity in interpretation by the other courts reinforces our responsibility to make an independent analysis of the applicable law to the undisputed facts." (JA-125).

Although it concluded that Conrail's past practice of establishing and changing fitness for duty standards and medical examinations constituted an undisputed, implied-in-fact contractual term (JA-121), the Third Circuit required Conrail to show the existence of an express agreement on the drug testing issue. The Third Circuit therefore announced that the standard to be applied in determining a minor dispute was, "[w]hen a court holds that an existing agreement, explicit or implied, arguably justifies a new practice, the court has determined that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue." (JA-125).

In holding that this case presented a major dispute, the Third Circuit found that ". . . Conrail cannot point to any existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results and the confidentiality protections to be employed. We search the past practices of the parties in vain for any indication of an agreement on these key matters. It follows that the agreement governing prior medical examinations cannot be strained to include, even arguably, an agreement to routinely perform a drug screen." (Citations omitted) (JA-128).

On the basis of the above, the Third Circuit concluded that the addition of a drug screen to the existing urinalysis component of Conrail's medical fitness for duty policy was not "arguably justified" by the prior practice. (JA-129).

SUMMARY OF ARGUMENT

This case questions whether Conrail can continue to implement and maintain medical fitness for duty policies that have for decades been a critical component of the safe operation of the railroads and airlines. There is no dispute between the Unions and Conrail that drug

testing is a serious problem in the transportation industry and that employees who are found to be using drugs and/or alcohol are not fit to perform their jobs safely. After years of establishing and changing, without union objection, medical fitness for duty standards and the diagnostic tests used in medical examinations conducted pursuant to those standards, Conrail added a drug screen to the existing urinalysis component of its medical examination. In response, the Unions instituted suit claiming that the drug screen was a new term of employment and that its implementation gave rise to a "major" dispute which required Conrail to bargain about the drug screen's implementation. Despite undisputed evidence showing that Conrail has always had the prerogative of establishing, and from time to time changing, the contents of its medical examinations, including requiring drug testing at the discretion of the examining physician, the Court of Appeals for the Third Circuit concluded that Conrail's addition of the drug screen was not "arguably justified" by its prior practice because Conrail could not prove an arguable "meeting of the minds" with the Unions over the issue of drug testing.

1. In view of the congressional purpose underlying the Railway Labor Act – the maintenance of uninterrupted commerce by rail through the peaceful and orderly resolution of disputes – the courts have developed categories of disputes, the character of which determines the manner and forum in which they are to be resolved. The court's limited role under the Railway Labor Act is simply to determine whether disputes are either "major" disputes involving the formation of collective bargaining agreements or efforts to secure them, *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. 711, 722-23 (1945), or "minor" disputes involving grievances or the interpretation or application of rates of pay, rules or working conditions as embodied in existing agreements and the practices of the parties. *Detroit & Toledo*

Shore Line R.R. v. United Transp. Union, 396 U.S. 142, 153-54 (1969). In recognition of the fact that a major dispute can eventuate in a strike, court decisions have long reflected a preference for treating disputes between carriers and unions as "minor disputes" so long as the position of the party claiming the right to take the challenged action "arguably" can be justified by the agreement or past practices, or if its contention is not "obviously insubstantial." *United Transp. Union v. Penn Central Transp. Co.,* 505 F.2d 542, 544 (3d Cir. 1974); *United Transp. Union v. Baker,* 482 F.2d 228, 230 (6th Cir. 1973).

2. The Third Circuit's decision was directly contrary to decisions of both the Seventh and Eighth Circuits in *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.,* 833 F.2d 700 (7th Cir. 1987) and *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.,* 802 F.2d 1016 (8th Cir. 1986), which held on virtually identical facts that the railroads' addition of a drug screen to the existing urinalysis component of their medical examinations gave rise to "minor" disputes under the Railway Labor Act.

3. The Third Circuit fundamentally misapplied the standard for identifying minor disputes. The court acknowledged that the past practice between Conrail and the Unions recognized Conrail's unilateral right to establish and change fitness for duty standards including physical examinations. Nevertheless, the court held that its perception of the "consequences" of drug testing and the "ethical and practical dilemmas" which it presented required that there "arguably" be an actual agreement or "meeting of the minds" between Conrail and the Unions related to drug testing.

4. In fashioning this intrusive standard for distinguishing between major and minor disputes, the court below incorporated into this Railway Labor Act case

concepts of "mandatory subject of bargaining" and "clear and unmistakable waiver" developed in a Guideline Memorandum of the General Counsel of the National Labor Relations Board ("NLRB"). By making this application, however, the Third Circuit ignored the plethora of "viable guidelines" available to it in resolving major and minor disputes and failed to rationalize the application of the National Labor Relations Act, as amended, 29 U.S.C. §§151-187 (1973) ("NLRA") to a dispute arising under the RLA. Moreover, the Third Circuit's unsupported incorporation of NLRA principles threatens to undermine the RLA's statutory purpose by diminishing the role of arbitration under the RLA and promoting rather than discouraging economic self-help in the form of strikes.

5. The Third Circuit's misapplication of well-established principles of law developed under the Railway Labor Act has injected substantial confusion into the manner in which courts channel major and minor disputes. This is because the lower court has implied that under certain circumstances courts can exceed their normal judicial role and decide the merits of a labor dispute in place of the NRAB.

6. This Court should therefore correct the Third Circuit's fundamental misapplication of legal principles by reversing that decision and finding that Conrail's addition of a drug test in the context of its fitness for duty medical program gave rise to a minor dispute under the Railway Labor Act.

ARGUMENT

I. CONRAIL'S ADDITION OF A DRUG TEST TO THE URINALYSIS COMPONENT OF ITS FITNESS FOR DUTY MEDICAL EXAMINATIONS GAVE RISE TO A MINOR DISPUTE.

A. The Development Of Major And Minor Dispute Procedures Reinforces The Congressional Intent To Assure Effective Resolution Of Controversies While Avoiding Interruptions To Commerce.

In enacting the Railway Labor Act of 1926,[8] Congress imposed on both railroads and employees the obligation to settle disputes without strikes or other self-help.[9] This was in direct recognition of the critical national importance of uninterrupted commerce by rail which the RLA was designed to protect.[10] The RLA itself is designed to provide for the prompt and orderly settlement of both fundamental contractual disputes and of grievances between unions and management, and in so doing channels economic forces "into special processes intended to compromise them." *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 41 (1957).

---

8. 44 Stat. 577, significantly amended in 1934, 48 Stat. 1185, codified at 45 U.S.C. §§151-188 (1982).

9. Section 2 First of the RLA creates a statutory duty of management and labor to settle disputes and avoid interruptions of operations. 45 U.S.C. §152 First. *Chicago & North Western Ry. v. United Transp. Union*, 402 U.S. 570 (1971).

10. "[F]ollowing decades of labor unrest that persistently revealed the shortcomings of every legislative attempt to address the problems, representatives of railroad labor and management created a system for dispute resolution that Congress enacted as the RLA." *See Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 107 S.Ct. 1841, 1850 (1987).

The RLA provides mechanisms for two distinct types of disputes: "major" disputes, which involve contract formation, amendment or acquisition of new rights; and "minor" disputes, which involve grievances over the interpretation or application of an existing agreement. Both of these categories are "sharply distinguished." *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. at 722-23 (1945); *See also Brotherhood of Locomotive Engineers v. Burlington Northern R.R.,* 838 F.2d 1087, 1090 (9th Cir. 1988), *petition for cert. filed* (U.S. April 1, 1988)(No. 87-1631).[11]

In major disputes the controversy relates to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past. *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. at 723. The procedures under the RLA for resolving major disputes contemplate use of an extensive mediation and conciliation mechanism and require the parties to attempt to resolve such disputes through negotiation, mediation and possible presidential intervention. *See Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 378 (1969); *Detroit & Toledo Shore Line R.R. v. United Transp. Union,* 396 U.S. at 148-50. The procedures of the RLA are purposely long and drawn out, based on the hope that over time reason and practical considerations will catalyze an agreement. *Brotherhood of Railway and Steamship Clerks v. Florida East Coast Ry.,* 384 U.S. 238, 246 (1966). Coupled with this extensive bargaining duty of both parties is the obligation to maintain the status quo[12] until the collective bargaining process has

11. The terms "major" and "minor" disputes do not appear in the RLA, but are the product of judicial decisions. *See Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. at 723-24.

12. Sections 5, 6 and 10 of the RLA (45 U.S.C. §§155 First, 156 and 160) require that no changes be made in rates of pay, rules or working conditions until the major dispute processes of the RLA have been completed.

been exhausted, a process which has been described by the Court as "almost interminable." *Detroit & Toledo Shore Line R.R. v. United Transp. Union,* 396 U.S. at 149, 150-53. The purpose of these exhaustive requirements is that if a major dispute cannot be resolved, the union then has the right to resort to self-help in support of its position. *Id.; Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees,* 481 U.S. 429, 107 S.Ct. 1841, 1851 (1987).

By contrast, "minor disputes" contemplate the existence of established rates of pay, rules or working conditions, or at any rate, a situation in which no effort is made to bring about a formal change in these terms of employment or to create new ones. "The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . [T]he claim is to rights accrued, not merely to have new ones created for the future." *Elgin, Joliet & Eastern Ry. v. Burley,* 325 U.S. at 723.[13] The resolution of minor disputes is brought about through a formal statutory grievance process that culminates in binding arbitration by the National Railroad Adjustment Board ("NRAB"), 45 U.S.C. §153.[14] If a grievance is resolvable under this process the union does not have a right to strike. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.,* 353 U.S. 30 (1957).

13. The "omitted case" refers to rights firmly grounded in past practice or prior courses of dealing and can include a situation "arguably within the scope of residual managerial prerogative left with the [carrier] by the agreement." *Airline Flight Attendants v. Texas Int'l Airlines, Inc.,* 411 F. Supp. 954, 959 (S.D. Tex. 1976), *aff'd mem.,* 566 F.2d 104 (5th Cir. 1978), *citing United Industrial Workers of Seafarers' Int'l Union v. Board of Trustees of Galveston Wharves,* 351 F.2d 183, 188 (5th Cir. 1965). *See also Railway Labor Executives' Ass'n v. Atchison, Topeka & Santa Fe Ry.,* 430 F.2d 994, 996-97 (9th Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971).

14. The National Railroad Adjustment Board, which was created by the RLA, provides for 34 members, composed equally of

The court's role in deciding if a particular dispute is minor or major is crucial because it determines the manner in which a federal court may support the resolution procedure established by Congress. *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1021 (8th Cir. 1986). If a dispute is found to be major and can ultimately result in self-help by either side, including potential disruption to the national rail or air[15] transportation systems, the status quo must be identified to provide stability for the collective bargaining process. The court has jurisdiction to enforce the status quo while bargaining occurs. Preservation of the status quo is thought to facilitate the collective bargaining process. *See Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. at 150. Federal courts have broad powers to enjoin unilateral actions by either side. This responsibility requires a threshold determination of the content of the prevailing rates of pay, rules or working

NOTES *(Continued)*
representatives of carriers and labor organizations, empowered to select neutral members to sit on the Board. 45 U.S.C. §153 First (a) and (l). The RLA also provides for the creation of "system" and "regional" boards of adjustment, 45 U.S.C. §153 Second, paragraph 1, as well as public law boards, identified in the Railway Labor Act as "special boards of adjustment," 45 U.S.C. §153 Second, paragraph 2. Each of these has exclusive jurisdiction to resolve minor disputes comparable to the exclusive jurisdiction of the Adjustment Board. *See generally Employees Protective Ass'n v. Norfolk & Western Ry.*, 511 F.2d 1040, 1044 (4th Cir. 1975). The NRAB or any Public Law Board may order a wide panoply of remedies including reinstatement and "the payment of money" to compensate an employee for sums of money to which he might be entitled. 45 U.S.C. §153 First (o). Standards for judicial review of Adjustment Board decisions are "among the narrowest known to the law." *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 91 (1978).

15. The airline industry is also covered by the Railway Labor Act, 45 U.S.C. §181; *International Ass'n of Machinists v. Central Airlines*, 372 U.S. 682 (1963).

conditions. *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d at 1021.

However, in minor disputes, the status quo allows the employer to take the disputed action, *Illinois Central R.R. v. Brotherhood of Railroad Trainmen*, 398 F.2d 973, 977 (7th Cir. 1968), but the NRAB has exclusive jurisdiction to decide the dispute. *Andrews v. Louisville and Nashville R.R.*, 406 U.S. 320 (1972). Recognizing that the NRAB is "an agency peculiarly competent" to resolve disputes in the rail industry, Congress "intended to leave a minimum responsibility to the courts." *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 566 (1946); *Slocum v. Delaware Lackawanna & Western R.R.*, 339 U.S. 239, 243 (1950).[16]

Because the judiciary has an inherently more intrusive role in major disputes than in minor disputes, the lower courts have held that the burden of proving a minor dispute is relatively "light." *Maine Central R.R. v. United Transp. Union*, 787 F.2d 780, 783 (1st Cir.), *cert. denied*, 479 U.S. 848 (1986); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d at 1022 (referring to the "relatively light" burden which the railroad must bear in showing a minor dispute); *Chicago and North Western Transp. Co. v. Railway Labor Executives' Ass'n*, 855

16. This Court has long recognized the NRAB's special expertise in determining these disputes.

> Congress, in the Railway Labor Act, vested the Adjustment Board with the broad power to arbitrate grievances and plainly intended that interpretation of these controversial provisions should be submitted for the decision of railroad men, both workers and management, serving on the Adjustment Board with their long experience and accepted expertise in this field.

Gunther v. San Diego & Arizona Eastern Ry., 382 U.S. 257, 261-62 (1965). *Accord Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157, 161 (1966).

F.2d 1277, 1283 (7th Cir. 1988), *pet. for cert. filed* (U.S. Sept. 16, 1988) (No. 88-464). In fact, in cases where there is some doubt whether a dispute is a "minor" dispute, it should be treated as "minor" subject to the mandatory and exclusive jurisdiction of the NRAB:

> Since the machinery for resolving major disputes is conciliatory rather than binding, a major dispute can escalate into a strike, which in the transportation industries – producers of a nonstorable service – can be a calamity. So it is no surprise that, when in doubt, the courts construe disputes as minor.

Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry., 768 F.2d 914, 920 (7th Cir. 1985). *See also Brotherhood Railway Carmen v. Norfolk & Western Ry.*, 745 F.2d 370, 374-75 (6th Cir. 1984); *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d at 705.

A long line of federal cases has recognized that a dispute will be treated as "minor" where the position of the party taking the challenged action can "arguably" be justified by the existing agreement or where the party's position is "even arguable," or is not "frivolous" or "obviously insubstantial."[17]

---

17. *See, e.g., Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d 1087, 1111 (9th Cir. 1988)("arguably justified"), *petition for cert. filed* (U.S. April 1, 1988)(No. 87-1631); *National Railway Labor Conference v. International Ass'n of Machinists & Aerospace Workers*, 830 F.2d 741, 746 (7th Cir. 1987)(minor unless claim is "frivolous" or "obviously insubstantial"); *Brotherhood of Railroad Signalmen v. Burlington Northern R.R.*, 829 F.2d 617, 619 (7th Cir. 1987)(court must decide whether the asserted contractual defense is "frivolous"); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986)("reasonably susceptible" to asserted interpretation); *Maine Central R.R. v. United Transp. Union*, 787 F.2d 780, 782 (1st Cir.)(court's role is limited to determining whether carrier's assertion is "even arguable"), *cert. denied*, 479 U.S. 848 (1986); *Brotherhood Railway Carmen v. Norfolk & Western Ry.*, 745 F.2d 370, 375 (6th Cir. 1984)("arguably justified" or "not obviously insubstantial"); *Air Line Pilots Ass'n, Int'l v. Trans World Airlines, Inc.*, 713 F.2d 940, 948 (2d Cir. 1983)(reasonably susceptible to the argued interpretation or not "obviously insubstantial"), *aff'd in part and rev'd in part on other grounds, sub nom., Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985); *Carbone v. Meserve*, 645 F.2d 96, 99 (1st Cir.)("even arguable"), *cert. denied*, 454 U.S. 859 (1981); *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 544 (3d Cir. 1974)("arguably justified"); *International Brotherhood of Elec. Workers v. Washington Terminal Co.*, 473 F.2d 1156, 1173 (D.C. Cir. 1972)("reasonably susceptible" to carrier's contention), *cert. denied*, 411 U.S. 906 (1973); *REA Express v. Brotherhood of Railway, Airline and Steamship Clerks*, 459 F.2d 226, 231 (5th Cir.)(minor dispute if position is "arguable"), *cert. denied*, 409 U.S. 892 (1972).

In determining whether a party's position is "arguably justified" or "even arguable" based on established rates of pay, rules or working conditions, it is not necessary that the term of employment itself be embodied in a written document. Thus, it has been recognized that such terms can be inferred from habit and custom. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142 (1969); *Brotherhood of Locomotive Engineers v. Burlington Northern R.R.*, 838 F.2d at 1091-92. Past practice, accepted or acquiesced in by a party, becomes part of the status quo. *Maine Central R.R. v. United Transp. Union*, 787 F.2d at 783. It is the arbitrator's role to review "practice, usage and custom" to determine the existing employment relationship. *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157, 161 (1966).

An employment term established by past practice and course of dealing becomes legally enforceable when a pattern of conduct is understood or acquiesced in by the other side. *United Transp. Union, Local Lodge No. 31 v. St. Paul Union Depot*, 434 F.2d 220, 222-23 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971). The

parties' rates of pay, rules or working conditions therefore include both the specific terms set forth in written agreements and well-established practices constituting a "course of dealing" between them. *Maine Central R.R. v. United Transp. Union,* 787 F.2d at 782; *accord Brotherhood of Railway, Airline & Steamship Clerks v. Atchison, Topeka and Santa Fe Ry.,* 847 F.2d 403, 406 (7th Cir. 1988).

When a railroad employer takes an action that is not prohibited by a collective bargaining agreement or prior course of conduct, it has not made a change in working conditions that breaches the employer's status quo obligation. The carrier has the right to act and challenges to that action are minor disputes. *See Rutland Ry. v. Brotherhood of Locomotive Engineers,* 307 F.2d 21, 35-36 (2d Cir. 1962) (minor dispute created when railroad unilaterally reduced train runs, even if that action resulted in reduction of jobs, where absence of negotiations between railroad and union over establishment of train runs gave railroad implicit right to determine those runs), *cert. denied,* 372 U.S. 954 (1963); *Baker v. United Transp. Union,* 455 F.2d 149, 151 (3d Cir. 1971)(where a railroad demonstrated a longstanding practice "of freely changing the location of physical and instructional examinations and instructional classes throughout its system without consultation with the union," it could continue to make the changes); *United Transp. Union v. Georgia R.R.,* 452 F.2d 226, 228 (5th Cir. 1971) (railroad's longstanding exercise of its right to determine tie-up or lay-over points without union objection was a matter reserved by practice for the railroad's determination), *cert. denied,* 406 U.S. 919 (1972). Disputes relating to the exercise of acquired or vested rights are therefore minor disputes because the right arises from the parties' labor-management relationship.

B. Conrail's Position Concerning The Addition Of A Drug Test To The Urinalysis Component Of Its Fitness For Duty Medical Examinations Was At Least "Arguably Justified" By Its Longstanding Unchallenged Past Practice And Therefore Gave Rise To A Minor Dispute.

At the outset, there is no disagreement between Conrail and the Unions that there is a "serious drug and alcohol problem in the transportation industry." (JA-129). Indeed, the Unions have publicly stated that they "yield to no one in abhorence [sic] of alcohol or drug use in employment, or in the desire to purge the industry of their adverse effects." (JA-129). In fact, the Unions concede that ". . . one who is using alcohol or drugs should not be working in the railroad system."[18] With respect to examinations related to determining employee fitness, the Unions have since 1976 acquiesced in Conrail's exercise of the unilateral right to both establish and change fitness for duty standards including the removal from service without pay of employees who are determined under those standards to be unfit to safely perform their jobs. (JA-109 to JA-110). In addition, for over ten years, Conrail's physicians have had the critical discretion to utilize drug testing as part of their medical determinations.

Presented with facts virtually identical to those involved in this case, the Seventh and Eighth Circuits recently held that the carriers' addition of a drug screen to an existing urinalysis component of a fitness for duty examination presented "minor" disputes under the RLA. In *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987) and *Brotherhood*

---

18. Transcript of oral argument by Lawrence M. Mann, Esquire, on behalf of the Railway Labor Executives' Association at p. 27, *Burnley v. Railway Labor Executives' Assoc.,* U.S. No. 87-1555.

of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R., 802 F.2d 1016 (8th Cir. 1986), the courts found that in view of the railroads' longstanding practices of making independent medical fitness for duty determinations without any bargaining or request to bargain by the unions, the addition of a drug screen to the existing urinalysis component of those determinations was arguably justified by the parties' practices. Both courts found that because the underlying purpose of the medical examinations – to determine fitness for duty – remained the same before and after the drug screen was added, the addition of a drug screen was simply an additional refinement in order to predict safe employee performance. Therefore the railroads' positions were found to be "arguably justified" by the prior practice and it was for the NRAB to definitively determine the working conditions that prevailed.

In *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986), it was undisputed that for many years the Burlington Northern Railroad ("BN") had an unchallenged practice of requiring employees to submit to periodic and comprehensive medical examinations in order to ensure all employees were fit for duty. Further, both the BN and the union agreed that the railroad had the right to ensure the safety of its operations by removing from service employees who were unable to perform their duties safely. 802 F.2d at 1024. The Eighth Circuit concluded that the basis of the controversy was the extent to which the existing urinalysis component of a physical examination could be further refined in order to predict safe employee performance. While recognizing that the BN's addition of the drug screen was a new technique, the court nevertheless found that the underlying purpose of the unchallenged medical policy – to ensure all BN employees were fit for duty – remained unchanged. Characterizing the drug

screen as "nothing more than a method designed to detect the presence of a newly emerging threat to that fitness," the court stated that it should come as no surprise to the union that the components of a work fitness medical examination would "change with the times." 802 F.2d at 1024. In view of these findings, the Eighth Circuit concluded that the BN's addition of the drug screen was "arguably justified" by its prior practice and objectives and therefore the dispute should be submitted to the NRAB. *Id.*

In the Seventh Circuit case, *Railway Labor Executives' Ass'n v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987) the Norfolk & Western railroad ("N&W") for a number of years had required employees to undergo certain routine medical examinations, both periodically and upon return-to-duty after certain extended absences. The purpose of these examinations was to ensure that employees were physically fit for their jobs. Similar to the practices undertaken by the BN and Conrail, the N&W had always had the unchallenged prerogative of determining fitness for duty standards and the content of all examinations related to those standards. 833 F.2d at 702. Urine specimens designed to detect the presence of albumin and blood sugar were a regular part of the physical examinations. After several years, the N&W began requiring that these urine samples also be tested for evidence of drug use. If the samples revealed the presence of drugs, employees were held out of service unless they could provide a drug free sample within 45 days. Failure to provide a clean sample within the 45 day period would result in the employee's dismissal for failure to obey instructions. In the alternative, N&W employees who tested positive for drugs could elect to participate in the railroad's employee assistance program and, under the program, the employee would be given an extended period of time to provide a drug-free sample. 833 F.2d at 702-03.

The Seventh Circuit found that the past practice had been to accord the N&W unilateral authority to determine the appropriate tests to conduct during required medical examinations. Therefore, the court concluded that the N&W's prerogatives to conduct routine medical examinations were part of an implied agreement congruent with those past practices that had become a "course of dealing" between N&W and the employees. 833 F.2d at 705-06. In reaching its decision that the union's challenge to the addition of the drug screen gave rise to a minor dispute, the Seventh Circuit cautioned: "We are not deciding that N&W's drug testing program is justified by its agreement with the unions. The NRAB, not this court, has exclusive jurisdiction to decide the merits of this case. We merely hold that N&W's argument that the parties' agreement justifies its drug testing program is not frivolous or obviously insubstantial." 833 F.2d at 707 (citations omitted).

These cases illustrate the low threshold in determining the NRAB's exclusive jurisdiction. That threshold precludes the court from deciding not only the ultimate merits of the issues, but also the scope of the relevant practice. If any reasonably articulated past practice could sustain the carrier's position, its resolution should be left to the NRAB.

The facts involved in this case are equally as compelling as those on which the Seventh and Eighth Circuits concluded that the BN's and the N&W's additions of drug screens constituted minor disputes. Conrail has had a longstanding, unchallenged practice of unilaterally establishing fitness for duty medical standards and related physical examinations (JA-110) which both the Unions and Conrail agree are designed to ensure employee fitness for their jobs. (JA-110). Employees found unfit for duty have always been subject to being removed from service without pay and are not returned

to duty until they are deemed fit by the Medical Department. Similar to both the BN and N&W, Conrail has required physical examinations for a number of years on a periodic and return-to-duty basis and has altered and amended the components of these examinations from time to time without any bargaining or request to bargain by the Unions. The components of these examinations have always included urinalyses for albumin and blood sugar and, without any objection by the Unions, have included drug screens when warranted in the judgment of the examining physician. [19] Moreover, beginning in 1984, Conrail actually required as part of its medical program that all physical examinations include a drug screen urinalysis. This program was enforced in the entire Eastern Region of Conrail for a period of six months. The purpose of Conrail's medical policy — to determine employees' fitness for duty — has not changed since 1976 and was not changed by the addition of the drug screen component in 1987.

Conrail's longstanding practice of establishing and changing medical standards related to employees' fitness for duty has evolved through the exercise by Conrail's Medical Department of the unchallenged prerogative of determining when employees are medically fit to safely perform their jobs. The addition of a drug screen to the existing urinalysis component of fitness for duty medical examinations represents an important diagnostic improvement in the detection and treatment of drug and alcohol abuse problems in the transportation industry. Where, as here, the Unions have never objected to Conrail's exercise of discretion in determining fitness for duty issues, Conrail's position that the addition of the drug screen, which is clearly related to

---

19. It is undisputed that since 1976 employees whose urine was to be tested for the presence of drugs were always told before they provided a urine specimen that such testing would be conducted. (JA-39).

determinations of fitness, is at least arguably justified by the parties' prior practice. Therefore, this dispute concerning whether the drug screen was actually warranted by the prior practice between Conrail and the Unions is within the exclusive jurisdiction of the NRAB.

II. IN DETERMINING THAT CONRAIL'S ADDITION OF A DRUG TEST GAVE RISE TO A MAJOR DISPUTE, THE THIRD CIRCUIT FUNDAMENTALLY MISAPPLIED WELL-SETTLED STANDARDS DEVELOPED UNDER THE RAILWAY LABOR ACT.

The Third Circuit's conclusion that Conrail's addition of the drug test constituted a major dispute under the RLA stands in sharp contrast to the decisions of the Seventh and Eighth Circuits on virtually identical facts. While the Third Circuit's analysis, considered superficially, may appear to follow prior precedent under the RLA, a careful review of the opinion shows that the court fundamentally misapplied well-settled principles of law and actually created a new standard by incorporating into its analysis three erroneous legal requirements. First, the Third Circuit mistakenly required Conrail to demonstrate that it ". . . is plausible to believe that there was in fact a meeting of the parties' minds" related to drug testing. (JA-125). Second, rather than acknowledging the significance of Conrail's longstanding, unchallenged practice of establishing and revising its fitness for duty medical standards, the Third Circuit chose to base its determination on the potential consequences of drug tests and the "controversial" nature of drug testing in general. Finally, the Third Circuit required Conrail to demonstrate the existence of an agreement related to drug testing which satisfied the concepts of "mandatory subject of bargaining" and "clear and unmistakable waiver" developed under the NLRA as embodied in a Guideline Memorandum of the NLRB's General Counsel. Therefore, the Third Circuit's finding

of a major dispute in this case was the direct result of its fundamental misapplication of the law through the creation of its own standard for determining minor disputes.

A. Conrail's Position That The Addition Of A Drug Test Gave Rise To A "Minor Dispute" Did Not Require It To Show The Existence Of A Prior "Meeting Of The Minds" On Drug Testing.

While correctly identifying the standard to be applied in determining the existence of a minor dispute, i.e., whether the disputed action could "arguably" be justified by the parties' existing practices and course of dealing, or whether the contention that the parties' prior practice sanctioned the disputed action was not "obviously insubstantial" (JA-120), the Third Circuit proceeded to misapply this test. In so doing, the court actually fashioned a new standard:

> When a court holds that an existing agreement, explicit or implied, arguably justifies a new practice, the court has determined that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue.

(JA-125).

The Third Circuit's formulation of this new standard, which is a complete departure from settled law, led directly to its mistaken conclusion that Conrail's addition of the drug screen created a major dispute under the RLA. Adherence to this new standard thus caused the lower court to ignore the parties' past practice related to fitness for duty medical examinations and to discount Conrail's prior drug testing as arising only on "particularized cause." (JA-126). Thus, the Third Circuit required Conrail to prove either an actual agreement on

drug testing or a past practice of "across-the-board" drug testing.[20] (JA-128).

The standard created by the court placed it in the improper role of deciding the merits of the parties' underlying dispute. *Union Pacific R.R. v. Sheehan,* 439 U.S. 89, 94 (1978); *Maine Central R.R. v. United Transp. Union,* 787 F.2d at 783; *see also* cases cited at p. 17, *supra.* By requiring Conrail to demonstrate the existence of an express agreement on the specific question of the use of drug testing in fitness for duty medical examinations, the court both defined and circumscribed the scope of the relevant past practice. In so doing, it decided important issues which were clearly reserved for the statutorily mandated arbitration process. *See, e.g.,* National Railroad Adjustment Board Award 23334 (1982)(JA-82 to JA-107) (NRAB had jurisdiction to decide whether railroad's unilateral implementation of intoxilyzers in support of Rule G enforcement program was consistent with prior custom and practice between carrier and union).[21]

The Third Circuit's requirement that Conrail demonstrate a "meeting of the minds" over the issue of drug testing thus forced Conrail into the untenable position of having to prove an actual agreement with the Unions

20. For example, the Third Circuit observed that "Conrail cannot point to any existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed. We search the past practices of the parties in vain for any indication of an agreement on these key matters." (JA-128) (citations omitted). The record is devoid of evidence that the Unions ever sought bargaining over the drug testing techniques and protocols related to such examinations.

21. The opinion of the NRAB was originally attached to the RLEA's reply to Conrail's motion for summary judgment in the district court below and is now included as part of the Joint Appendix. (JA-82 to JA-107).

over precisely what it believed it had the right to do in the first place. Had Conrail satisfied this unique burden, there could have been no dispute with the Unions over the addition of the drug screen. The Third Circuit exceeded its proper role by precluding the NRAB from determining whether Conrail's longstanding, unchallenged prerogative of establishing and maintaining all fitness for duty standards actually justified the drug screen.

B. The Addition Of A Drug Test Did Not Give Rise To A Major Dispute Because Of The "Controversial" Nature Or "Consequences" Of Drug Testing.

Although claiming that it was not reaching the issue of whether Conrail's addition of a drug screen to its existing urinalysis constituted an extension of disciplinary Rule G, the Third Circuit stated that the issue before it was whether the expansion of drug screening as part of fitness for duty examinations was arguably justified by Conrail's medical policy or Rule G. (JA-121; JA-129). Despite this formulation, the Third Circuit's decision required Conrail to demonstrate not only that the drug screen was arguably justified by its prior practice related to medical fitness determinations, but also that it complied with the past practice related to enforcement of Rule G. Accordingly, the Third Circuit observed that if it were to hold that the inclusion of a drug screen was arguably justified by the medical policy, "it would expand the scope and effect of medical testing beyond that of Rule G, the disciplinary rule aimed specifically at substance abuse." (JA-126 to JA-127).

The court thus focused its attention on what it perceived to be the disciplinary impact of the addition of the drug screen component to the existing urinalysis. By so doing, the court shifted its attention away from the issue of whether the addition of the drug screen was

even arguably based on the parties' practice, and focused instead on the impact of that practice.[22] However, minor disputes are not determined by their impact. *Hilbert v. Pennsylvania R.R.*, 290 F.2d 881, 885 (7th Cir.) ("a major dispute does not depend on the number of people involved"), *cert. denied*, 368 U.S. 900 (1961). "Since the distinction between the two [major versus minor disputes] is based on whether or not there is a non-frivolous argument that reference to a collective bargaining agreement will resolve the dispute, it seems unlikely that the magnitude of the actual impact of the disputed practice can change the characterization of the dispute." *National Railway Labor Conference v. International Ass'n of Machinists and Aerospace Workers*, 830 F.2d 741, 747 n. 5 (7th Cir. 1987).

In addition to focusing on the perceived disciplinary aspects of the addition of the drug screen, the Third Circuit emphasized the controversial nature of drug testing. It rejected Conrail's argument that drug testing was to be treated the same as testing urine for blood sugar and other physical conditions, stating that "[t]his [argument] ignores considerable differences in what is tested for and the consequences thereof. Employee drug testing is a controversial issue throughout the railroad industry and beyond. The practice poses serious ethical and practical dilemmas as well." (JA-127) (citations omitted).[23]

---

22. The Third Circuit's characterization of the physician's medical judgment of possible drug use as "particularized cause" evidences its mistaken belief that such determinations were synonymous with supervisory observations of suspected drug use under Rule G. Such analysis would suggest that in order to perform an electrocardiogram or test for albumin the examining physician must have particularized cause to believe that a person has heart disease or kidney disease.

23. With one exception, all of the cases cited by the Third Circuit to demonstrate the controversial nature of drug testing involved constitutional challenges under the Fourth Amendment.

The Third Circuit's concern with the impact of drug testing and its controversial nature caused it to define the parties' practices and to intrude upon the NRAB's jurisdiction by determining Conrail's rights. However, the fact that the disputed issue in this case involves drug testing, an issue of recognized national importance, does not lessen the policy considerations favoring a finding of a minor dispute under the Railway Labor Act, nor does it justify judicial intervention into issues exclusively within the province of the NRAB.

C. The Existence Of A Minor Dispute Is Not To Be Determined By Application Of Principles Of Law Developed Under The National Labor Relations Act As Embodied In A Guideline Memorandum Of The NLRB's General Counsel.

The Third Circuit's error is both compounded and revealed by its ultimate reliance upon principles derived under the NLRA. Specifically, the court below found "particularly significant" a Guideline Memorandum prepared by the General Counsel of the NLRB. NLRB General Counsel Memo 87-5, 4 Lab. L. Rep. (CCH) ¶9344 (1987).[24]

---

24. In addition to the Third Circuit, the Fifth Circuit has also recently fallen into the trap of viewing the two statutes as coextensive. In *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 842 F.2d 794, *reh'g granted*, 853 F.2d 283 (5th Cir. 1988), the Fifth Circuit, in a confusing opinion which applied standards for determining mandatory subjects of bargaining under the NLRA to a case arising under the RLA, held that Southwest's use of drug testing to enforce Rule G constituted a "mandatory subject of bargaining" under the RLA. Further compounding the confusion, the court held that the union had not clearly and unmistakably waived its right to bargain over drug testing. Finally, relying in part on the "Guideline Memorandum" prepared by the NLRB General Counsel, the court concluded that Southwest's drug testing program created a "major" dispute. However, that decision

The Third Circuit's application of the NLRB General Counsel's unreviewed legal opinion to the statutory structure established under the RLA was wholly unwarranted and contributed to the Third Circuit's erroneous minor dispute analysis. By applying NLRA concepts to the instant case, the court below totally ignored the fundamental policy reasons underlying the RLA's unique method of resolving disputes, "techniques [that are] peculiar to [the railroad] industry." *California v. Taylor*, 353 U.S. 553, 566 (1957). The court thereby injected confusion into established case precedents developed under each of these statutory schemes.

This Court has emphasized repeatedly that "the National Labor Relations Act cannot be imported wholesale into the railway labor arena," due to the fundamental differences between the RLA and the NLRA. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383-84 (1969). This is particularly true where, as here, the disputed issue under the two statutes involves the specific statutory mechanism for resolving labor disputes. *Chicago & North Western Ry. v. United Transp. Union*, 402 U.S. 570, 579 n.11 (1971); *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686-87 n.23 (1981).[25]

NOTES *(Continued)*
has now been vacated by the granting of rehearing *en banc* by the Fifth Circuit. *See* 5th Cir. R. 35. At least two district courts have relied heavily upon the General Counsel's Guideline Memorandum in deciding RLA issues similar to those raised in the instant case. *Railway Labor Executives' Ass'n v. Port Authority Trans-Hudson Corp.*, 695 F. Supp. 124 (S.D.N.Y. 1988); *Railway Labor Executives' Ass'n v. National Railroad Passenger Corp.*, 691 F. Supp. 1516 (D.D.C. 1988), *appeal filed*, No. 88-7189 (D.C. Cir. Aug. 8, 1988).

25. In *Communications Workers of America v. Beck*, U.S., , 108 S. Ct. 2641 (1988), the Court recently affirmed that analogies between the RLA and NLRA are appropriate only after undertaking a painstaking review of the statutory language, legislative history, congressional intent and institutional history under both statutes. Although Justices Blackmun, O'Connor and Scalia

Ignoring prior guidance from this Court regarding cross-application of principles under the RLA and NLRA, as well as its own precedent,[26] the Third Circuit incorporated the "position" of the NLRB's General Counsel. In so doing, the court below failed to follow this Court's admonition that NLRA analysis may be applied to the RLA only in the absence of "viable guidelines" under the RLA. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. at 391. Clearly, there is an abundance of RLA guidelines concerning major and minor disputes.[27]

Moreover, had the Third Circuit investigated the two statutes it would have found considerable differences between those statutes which would have precluded the application of NLRA principles to this case. Among the most fundamental differences between the two statutes are those involving the distinctive burdens imposed on the employer before allowing unilateral action and the separate approaches to the resolution of labor disputes. The General Counsel's Guideline Memorandum accurately states the principle under the

---

disagreed with the majority's analysis of the legislative history of the two statutes, they concurred with the majority that "the scope of the RLA is not identical to that of the NLRA and that courts should be wary of drawing parallels between the two statutes." 108 S. Ct. at 2664, *citing First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666 and *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969).

26. *See Railway Labor Executives' Ass'n v. Pittsburgh & Lake Erie R.R.*, 845 F.2d 420, 429-30 (3d Cir. 1988), *petition for cert. filed* (U.S. May 17, 1988) (No. 87-3797).

27. Appendix C to the Brief for Respondents in Opposition to the petition for writ of certiorari in *Chicago and North Western Transp. Co. v. Railway Labor Executives' Ass'n*, 855 F.2d 1277 (7th Cir. 1988), *petition for cert. filed* (U.S. Sept. 16, 1988) (No. 88-464), now pending before this Court, lists some 50 cases, decided by ten different circuits, in which the "arguably" standard has been adopted and applied. *See also* cases cited at n. 17, p. 18.

NLRA that "any waiver by the union of [the NLRA's] statutory right to bargain . . . by . . . past practice or by inaction, is not to be lightly inferred and must be 'clear and unmistakable.' " 4 Lab. L. Rep. (CCH) ¶9344 at 19,203. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *NLRB v. Jacobs Mfg. Co.*, 196 F.2d 680 (2d Cir. 1952); *The Press Co.*, 121 N.L.R.B. 976 (1958). Thus, under the NLRA, a heavy burden is placed on the employer to demonstrate the union's waiver of its statutory right to bargain collectively. This reflects the lack of statutory mechanisms for resolving collective bargaining disputes other than through the use of economic force in the form of strikes. Under the NLRA, the National Labor Relations Board is required to make a definitive decision with respect to the rights of the parties. If the NLRB finds a waiver of the right to bargain, the union is foreclosed from raising the issue until the expiration of the existing agreement.[28]

By contrast, the Railway Labor Act, grounded in the congressional policy of preventing interruption of commerce, establishes a statutory grievance process which includes binding arbitration by the NRAB. 45 U.S.C. §153. Because of the presence of this principal dispute resolution mechanism, the RLA does not include either a counterpart to the NLRB or an express role for the courts. The courts' decisions under the RLA have been sensitive to the importance of arbitration and have not interfered in the exclusive jurisdiction of the NRAB. Thus, the RLA has evolved to impose on an employer

28. *See, e.g., The Press Company*, 121 N.L.R.B. 976 (1958), one of the earliest cases announcing the clear and unmistakable waiver doctrine. In that case, the Board held that relieving the employer of the requirement to demonstrate that the union clearly and unmistakably waived its interest in bargaining over a particular subject would increase the likelihood of confrontation, either at the bargaining table or by forcing the union to resort to strikes. 121 N.L.R.B. at 978.

only the relatively light burden of demonstrating that its actions are arguably justified by the parties' collective bargaining relationship. If this minimal threshold is met, the statute requires that the matter be resolved through binding arbitration, without resorting to economic self-help in the form of strikes. *Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957); *Brotherhood of Locomotive Engineers v. Louisville & Nashville R.R.*, 373 U.S. 33 (1963).

By uncritically incorporating NLRA concepts of "mandatory subject of bargaining" and "clear and unmistakable waiver" into this RLA dispute, the Third Circuit ignored the RLA's statutory scheme which provides a special mechanism for channeling disputes and favors their peaceful resolution. Applying NLRA principles, the Third Circuit concluded that, because Conrail could not point to an express agreement between the parties on the subject of drug testing, its addition of a drug screen to its existing urinalysis created a major dispute under the RLA. (JA-128). Requiring a railroad employer to prove the existence of an express contractual agreement or a clear and unmistakable waiver by a union arrogates the task of the NRAB of defining the practices of the parties and the working conditions that mark the employment relationship. Although an intrusive waiver standard may be appropriate for determining bargaining obligations under the NLRA, this approach is out of step with the RLA's statutory scheme of requiring disputes to be resolved by non-judicial forums that understand the context of the parties' relationship.

Even assuming that principles developed under the NLRA have any application to the instant dispute, the General Counsel's Guideline Memorandum does not constitute precedent under the NLRA, and therefore the

Third Circuit's reliance on it was misplaced.[29] While the General Counsel has final authority regarding the filing, investigation and prosecution of unfair labor practice charges, only the National Labor Relations Board has final agency authority with respect to the adjudication of complaints. 29 U.S.C. §153(d); *NLRB v. United Food and Commercial Workers Union, Local 23,* U.S. , 108 S.Ct. 413 (1987). A decision by the General Counsel to issue a complaint is merely "the necessary first step to trigger the Board's adjudicatory authority. However, until a hearing is held the Board has taken no action; no *adjudication* has yet taken place." *NLRB v. United Food and Commercial Workers Union, Local 23,* 108 S. Ct. at 422 (emphasis in original). *See also NLRB v. Sears Roebuck & Co.*, 421 U.S. 132 (1975)(Advice and Appeals Memoranda discussing the reasons for filing a complaint are not final opinions of an administrative agency).

The Third Circuit's adoption of NLRA principles as embodied in the NLRB General Counsel's Guideline Memorandum evidences its recognition of the need to look beyond legal precedent developed under the Railway Labor Act in order to justify its analysis in this case. The Third Circuit's unsupported integration of concepts developed under these different statutory schemes threatens to inject considerable confusion into a well-settled area of law.

29. As the Third Circuit recognized, the General Counsel's Memorandum reflects only her "position" concerning the question of whether drug screening constitutes a mandatory subject of bargaining under the NLRA. (JA-127). Apparently recognizing her limited statutory authority, the General Counsel stated in her memorandum that, with respect to the issue of whether drug testing of applicants for employment is a mandatory subject of bargaining, "I have authorized complaints on this issue in order to place the question before the Board." 4 Lab. L. Rep. (CCH) ¶9344 at 19,202. Moreover, the General Counsel's opinion has not been, and cannot be, subject to judicial review until such time as the NLRB has decided a case evaluating the General Counsel's theory. *NLRB v. United Food and Commercial Workers Union, Local 23,* U.S. , 108 S.Ct. 413, 425 (1987); *Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n,* 382 U.S. 181, 192 (1965).

The growing problem of drug and alcohol abuse in the transportation industry is well-documented in submissions to this Court and recent federal regulations. The parties to this litigation fundamentally agree that employees using drugs should not be working in the railroad industry. In 1987, recognizing that the magnitude of the drug problem demanded a more proactive response, Conrail undertook reasonable measures to increase the ability of its Medical Department to make fitness for duty determinations. By so doing, Conrail did not change the existing ground rules governing medical standards or physical examinations required of its employees.

Under well-settled principles of law recognizing the limited role of federal courts in channeling rather than deciding RLA disputes, the Unions' challenge to Conrail's actions should be resolved in the arbitration process. Guidance from this Court is necessary as to the proper standard to be applied in determining that this case presents a minor dispute. This guidance will prevent the lower court from undermining the statutory scheme of the Railway Labor Act and from arrogating the arbitration function which the statute plainly places with the NRAB.

CONCLUSION

For all of the reasons stated above, Petitioner Consolidated Rail Corporation requests that the judgment of the court below be reversed.

Respectfully submitted,

HARRY A. RISSETTO
1800 M Street, N.W.
Washington, D.C. 20036

DENNIS J. MORIKAWA *
MICHAEL J. OSSIP
SARAH A. KELLY
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5513

BRUCE B. WILSON
JEFFREY H. BURTON
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Of Counsel:
MORGAN, LEWIS & BOCKIUS

November 28, 1988

Attorneys for Petitioner
Consolidated Rail Corporation

* Counsel of Record

QUESTION PRESENTED

Do the federal courts have jurisdiction to enforce the notice, bargaining and status quo obligations of the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, when a carrier unilaterally changes existing working conditions, asserting that it has a contractual right to make such unilateral changes, but fails to establish that it has a clear and patent contractual right to make those changes?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES AND OTHER MATERIALS:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1

CONSOLIDATED RAIL CORPORATION,
Petitioner,
v.
RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS

On October 3, 1988, this Court granted the petition of Consolidated Rail Corporation [hereinafter, "Conrail"] and issued a writ of certiorari to the United States Court of Appeals for the Third Circuit to review the judgment and opinion of that court in *Railway Labor Executives' Assoc. v. Conrail*, 845 F.2d 1187. This brief is respectfully submitted by respondent Railway Labor Executives' Association [hereinafter, "RLEA"] [1] and eighteen of its member organizations [2] in support of the Third Circuit's decision and judgment.

[1] RLEA is an unincorporated association of the chief executive officers of nineteen (19) labor organizations which collectively represent most organized rail employees in this Country. A list of RLEA's member organizations is attached to this brief as Appendix A.

[2] The United Transportation Union's Yardmasters' Department is a member organization of RLEA, but was inadvertently not included in the caption of the Complaint as a plaintiff; that organization, however, was listed as a plaintiff in the body of the complaint.

COUNTERSTATEMENT OF THE CASE

While drug abuse has received national attention during the past few years, it is not a new problem, either for the country as a whole or for the rail industry in particular. Indeed, drug abuse has posed a serious safety threat to the rail industry, and to the public affected by their operations, virtually since the inception of this industry. In the early nineteenth century, before railroad employees were organized, their employers attempted to control drug abuse by promulgating a rule for the conduct of employees, commonly called Rule G,[3] which forbids employees from using, possessing, or being under the influence of alcohol while on duty or while subject to call.[4] Department of Transportation, Federal Railroad Administration, *Random Drug Testing; Amendments To Alcohol/Drug Regulations*, 53 Fed. Reg. 47,102 at 47,103 (Nov. 21, 1988). Those rules have since been expanded to ban the use of controlled substances while on duty or subject to call. Rail management has not been alone in its efforts to eliminate the safety hazards arising from drug usage, for as the Federal Railroad Administration [hereinafter, "FRA"] noted recently while discussing the "development of employee assistance programs and encouragement of education and awareness activities" concerning drug usage

---

[3] Conrail's Rule G now provides as follows (J.A. at 63):

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited. Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties.

[4] Virtually all railroads have promulgated rules outlining conduct which they require of their employees. These rules have various names, such as "Operating Rules" or "Rules For The Conduct And Guidance Of Employees," and, as a general matter, the rules themselves have not been the subject of collective bargaining. However, rail labor has bargained about the manner in which those rules are enforced. *See*, Joint Appendix [hereinafter, "J.A."] at 40-41, 45, 63-65, 109-10. Rule G is such a rule.

(53 Fed. Reg. at 47,102): "Rail unions have included sobriety and mutual assistance in their organizational objectives since their formation in the last century." This organizational objective has continued up to and including the present, for rail labor, together with rail management, and along with the cooperation of the FRA, have developed programs, which are currently in place on several large railroads, that educate employees to the dangers inherent in alcohol and controlled substance abuse, encourage employees to identify co-workers who are impaired by drug usage or who have a drug problem, and provide appropriate assistance to rehabilitate those identified employees. *Id.*, 53 Fed. Reg. at 47,102-103. *See also*, Joint Appendix in No. 87-1555, *Burnley v. RLEA*, at 111-12. Moreover, rail labor has entered into agreements with carriers that deal with the manner in which tests will be conducted and the consequences of testing positive for the presence of controlled substances. *See*, 53 Fed. Reg. at 47,108, 47,110, and 47,115.

This case, however, does not present such a program or agreement. Rather, it involves petitioner Conrail's unilateral efforts to control drug usage without providing the employee-safeguards, such as procedures to insure the accuracy of the test results, confidentiality assurances, and rehabilitation incentives, that rail labor has long maintained are essential to an effective and fair program.

A. *Conrail's Drug Testing Policies*

Conrail is a creature of statute, and it was required by Section 504(a) of the statute which created it, the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 774(a) (repealed), with certain exceptions not relevant here, to "assume and apply . . . all obligations under existing collective-bargaining agreements covering all crafts and classes employed" on the railroads whose properties formed Conrail's rail system. Conrail, in compliance with that statute, thus assumed and applied on

April 1, 1976, Rule G and comparable rules, as well as those collective bargaining obligations associated with the enforcement of those rules. J.A. at 45. As pertinent to this case, Rule G and comparable rules on Conrail, as was the case on Conrail's predecessors, do not prohibit the use of alcohol or controlled substances while an employee is off duty and not subject to call for service. J.A. at 63. Moreover, until recently, Conrail and its predecessors relied solely upon supervisory sensory observations and voluntary rehabilitation to enforce its drug and alcohol restrictions. J.A. at 63-64.

Besides restricting drug usage while on duty or subject to call, Conrail and its predecessors have established certain physical standards which an employee must meet to perform safely the work which may be assigned to that employee. In order to assure that employees meet those medical standards, Conrail requires all applicants to undergo a pre-employment physical. J.A. at 72. Conrail also requires periodic and return-to-duty physicals for current employees. This case involves solely the physicals for current employees and whether Conrail can change its policies concerning drug screening without first bargaining with rail labor. As Conrail informed the district court: "Conrail requires employees to undergo periodic physical examinations every three years up to and including age fifty and every two years thereafter, with some exceptions" not relevant here. J.A. at 68. All train and engine service employees who have been out of service for more than thirty (30) days are required to undergo a physical before they can return to duty, and all other classes of employees who have been out of service for more than ninety (90) days are required to undergo a return-to-work physical. J.A. at 69. Finally, Conrail requires employees who have certain medical problems, such as epilepsy, hypertension or a prior heart attack, to undergo periodic special medical examinations. J.A. at 69-70.

When an employee or prospective employee undergoes a medical examination, Conrail "routinely includes" a urinalysis for blood, sugar, and albumin. J.A. at 69, 72. Rail labor has not objected to that practice. In 1978, however, Conrail began to test the urine obtained from some employees during those periodic medical examinations for the presence of controlled substances and alcohol. J.A. at 39-40. But not all urine samples were tested for the presence of those substances;[5] rather (J.A. at 65):

> With respect to return-to-duty physical examinations, a drug screen has been included as part of the urinalysis when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. With respect to periodic physical examinations, a drug screen has been included as part of the urinalysis when, in the judgment of the examining physician, the employee may have been using drugs.

According to Conrail, "employees whose urine was tested for the presence of drugs/alcohol were always told before they provided a urine specimen that such testing would be conducted." J.A. at 39.

In October 1985, Conrail posted a notice on its bulletin boards announcing that it was revising its testing rules to conform to the post-accident testing regulations promulgated by the FRA at 49 C.F.R. § 219, *et seq.*, and, in February 1986, Conrail sent a pamphlet to all employees "which also announced the rules promulgated by the" FRA in 1985. J.A. at 41. Those new procedures were implemented in March 1986, when Conrail instituted a policy of requiring all employees covered by the Hours

---

[5] In 1984, Conrail modified this practice to require a drug screen as part of all urine analyses, but that practice was implemented in only one of the four Conrail regions and was discontinued for budgetary reasons six months thereafter. J.A. at 68.

of Service Act, 45 U.S.C. § 61, *et seq.*,[6] to undergo post-accident or rules violation urine toxicological testing. According to Conrail, this form of testing was required by the FRA's regulations, promulgated on July 29, 1985, which instructed most railroads, including Conrail, to perform toxicological urine tests of employees covered by the Hours of Service Act who were involved either in train accidents or in specified operating rule violations. 49 C.F.R. Part 219, § 219.202, *et seq.*[7] J.A. at 64. However, after a Conrail train was involved in a serious collision in January 1987 in which people were killed and injured, and where the engineer and conductor of the Conrail train later admitted smoking marijuana in the engine cab just prior to the collision, Conrail announced on February 20, 1987, that all employees who underwent a periodic, return-to-duty or follow-up physical would be required to provide at those physicals urine samples which would be subjected to toxicological analyses for the presence of controlled substances. J.A. at 68.

Although Conrail claims that this new testing policy is justified by its medical examination policy, the impact on employees is different than is the case when a physical uncovers a medical problem. Conrail employees who undergo a periodic or return-to-work physical and fail to meet Conrail's medical standards are held out of service until the medical condition is corrected. J.A. at 70. Significantly, those employees do not lose their seniority because of their medical problems. *Id.* However, employees who test positive for the presence of controlled

[6] Employees who are subject to the Hours of Service Act are defined as those individuals "actually engaged in or connected with the movement of any train, including hostlers." 45 U.S.C. § 61(b)(2).

[7] RLEA challenged those regulations and they were found to be in violation of the Fourth Amendment to the Constitution of the United States as being an unreasonable search and seizure. *RLEA v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, Sup. Ct. No. 87-1555 (June 6, 1988). That case was argued before this Court on November 2, 1988.

substances during a periodic or return-to-work physical are held out of service and will lose their seniority unless they either test negative for the presence of controlled substances within forty-five (45) days or agree to enter, and are accepted into, an approved treatment program, in which case the employee is then given 125 days to provide a negative drug test. J.A. at 70.

Once Conrail implemented its new testing rules, RLEA and its constituent organizations responded by filing a complaint with the United States District Court for the Eastern District of Pennsylvania against Conrail on May 1, 1986, seeking declaratory and injunctive relief to prevent Conrail from changing the working conditions of employees.[8] J.A. at 11. Conrail responded to the complaint by asserting, among other defenses, that the dispute over its ability to change its testing procedures was a "minor" dispute subject to the exclusive jurisdiction of the Railway Labor Act's adjustment boards and, thus, was a dispute over which the district court had no jurisdiction. J.A. at 31.

B. *Rulings Of The Lower Courts*

On April 28, 1987, the district court entered an order dismissing rail labor's complaint for lack of subject matter jurisdiction. J.A. at 108. According to the district court, "Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy." J.A. at 109. As the district court explained (J.A. at 109-10):

> The union [*sic*] and Conrail always have shared a concern over drug and alcohol abuse, *see* Rule G, stipulation ¶ 1, and since 1976 they have acquiesced

[8] RLEA also asserted that the testing violated the Fourth Amendment of the Constitution of the United States. J.A. at 22. However, the district court held that rail labor had failed to show that Conrail was a "federal actor" and dismissed the search and seizure challenge; respondents did not appeal from that ruling and, thus, that constitutional issue is not presented by this case.

> in certain procedures to ensure an employee's fitness for the job. The parties always have recognized Conrail's right to remove from service employees who are unable to perform their duties safely. Conrail's drug testing program is a further refinement of that practice and is consistent with its right to ensure the safety of its operations.

Since it concluded that Conrail's contractual justification argument was at least "arguable," the court held that the dispute was a minor one over which it had no jurisdiction, and it accordingly dismissed the complaint. J.A. at 110. Respondents noted an appeal to the United States Court of Appeals for the Third Circuit on May 15, 1987.

On April 25, 1988, the court of appeals issued its decision reversing and remanding the district court's judgment, because, in the appellate court's opinion, it was not "plausible to believe that there was in fact a meeting of the parties' minds on the general issue." J.A. at 125. Consequently, the court of appeals concluded, this case did not involve a dispute over an interpretation of a contract, but rather, involved a dispute over a change in working conditions which could not be accomplished until Conrail had complied fully with the dispute resolution procedures of Section 6 of the Railway Labor Act, 45 U.S.C. § 156. J.A. at 129.

After observing that the Railway Labor Act has always drawn a "distinction between disputes arising from grievances and the interpretation of a contract ('minor' disputes), on the one hand, and disputes arising from changes in pay rates, work rules and working conditions ('major' disputes), on the other" (J.A. at 118), the appellate court noted that the terms "major" and "minor" were used in their literal sense by the rail industry when the Act was amended in 1934 to make the adjustment of "minor" disputes both mandatory and conclusive. J.A. at 119. The court then examined this Court's analysis of the difference between the two classes of disputes in *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S.

711, 723-25 (1945), and observed that its circuit had adopted the "arguably justified" test for distinguishing between the two classes of disputes. J.A. at 120. As the appellate court explained, for purposes of distinguishing between the two classes of disputes, it made no difference whether the terms of a collective bargaining agreement were embodied in a written agreement or in an implied-in-fact agreement. *Id.*

That fact was important here, because (J.A. at 121):

> In this case, the district court found, and the parties do not dispute, that Rule G and the medical examination policy, although not incorporated in the parties' written agreement, constitute implied-in-fact contractual terms. Thus, we reach the principal issue: whether Conrail's imposition of a drug screen was an interpretation of one or both of these agreements thereby constituting it as a minor dispute under 45 U.S.C. § 153, First, (i), which it could institute unilaterally, or whether its attempt to impose such a drug screen was a new term constituting a major dispute under 45 U.S.C. § 152, Seventh, over which it must bargain.

Addressing the implied agreement on medical examinations, the appellate court concluded that it was not plausible to believe that Conrail and its unions had reached a meeting of the minds on drug testing without particularized cause. As the court explained (J.A. at 126-27):

> If we were to accept Conrail's argument that its prior medical testing justified the drug screen, it would expand the scope and effect of medical testing beyond that of Rule G, the disciplinary rule aimed specifically at substance abuse. Under Rule G, only employees who are impaired while on the job or on call may be disciplined, whereas an employee whose drug use is detected through the new medical testing program may be fired even though s/he was never found to be impaired while at work or subject to duty.

As further support for its conclusion that it was not plausible to believe that the parties had reached any agreement on drug testing as a routine matter, the court noted that the issue of drug testing presents a particularly contentious subject, both in the rail industry and in other industries, because of the serious ethical and practical dilemmas which it poses. J.A. at 127. Since Conrail could not point to any existing agreement between it and rail labor "on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed" (J.A. at 128), all of which were subjects which naturally flowed from the drug testing issue, the appellate court concluded that "the agreement governing prior medical examinations cannot be strained to include, even arguably, an agreement to routinely perform a drug screen."[9] *Id.*

Conrail filed a petition for a writ of certiorari with this Court on June 30, 1988, and on October 3, 1988, this Court granted that writ. This review proceeding has followed.[10]

---

[9] Rail labor has asserted throughout this case that the new testing represented a change in the method of enforcing Rule G, but Conrail has denied any such connection. J.A. at 128. In view of its ruling on Conrail's medical examination claim, the appellate court did not reach the Rule G enforcement issue. J.A. at 129.

[10] On November 21, 1988, the Department of Transportation caused various regulations to be published in the Federal Register to implement the Department's policy of a "drug-free transportation workplace." 53 Fed. Reg. 47,002 (Nov. 21, 1988). Included in those regulations were regulations by the FRA calling for random testing and imposing a requirement that railroads prohibit the use of unauthorized controlled substances by off-duty employees; those regulations, however, will apply solely to employees covered by the Hours of Service Act, *supra*. 53 Fed. Reg. at 47,102-08. RLEA has filed suit in the United States District Court for the Northern District of California challenging those new regulations. *RLEA v. Burnley*, Civil Action No. C-88-4824-CAL.

SUMMARY OF ARGUMENT

Although this case factually involves drug testing, the wisdom of such testing or the need for railroads to control the abuse of drugs by their employees is not at issue in this case. Indeed, rail labor has long recognized the need to control drug abuse, including the abuse of alcohol, by rail employees, and it has sought to address this problem by various methods, including through the collective bargaining process. This case, however, does present a legal issue which is very much in dispute today in the rail industry, as well as in the airline industry which is also covered by the Railway Labor Act, 45 U.S.C. § 151, *et seq.* That question is whether a carrier subject to that labor statute may implement new work rules and working conditions without first bargaining with rail labor simply by asserting that it has by past practice the implied contractual right to implement the new rules and working conditions, and that any dispute over its change of working conditions therefore raises only a "minor dispute" over which the adjustment boards have exclusive jurisdiction. Respondents respectfully submit that the Third Circuit was correct in concluding that Conrail's unilateral actions violated the major dispute resolution procedures of the Railway Labor Act.

I. Rail labor disputes concerning rates of pay, rules or working conditions have long been divided into two classes: disputes over changes to existing agreements—"major disputes;" and disputes over grievances or the interpretation or application of existing agreements—"minor disputes." Disputes over changes have always presented the most concern to the industry and, thus, have posed the greatest danger to uninterrupted rail service. Congress has repeatedly recognized that fact and it has agreed with rail labor and management that such disputes should be subject to compulsory conferences, mediation, and public scrutiny, but not compulsory arbitration, before either side would be allowed to change

the actual, objective working conditions and practices broadly conceived, which were in existence when the dispute arose. *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 152 (1969).

Contrary to Conrail's assertions, the Act's status quo obligation is not rendered nugatory by a carrier's claim that it has a contractual right to change the existing working conditions. Rather, the duty to exert every reasonable effort to settle all disputes set forth in Section 2 First of the Act, 45 U.S.C. § 152 First, as well as the fact that "disputes concerning changes in . . . rules, or working conditions may not be . . . referred" [11] to the adjustment boards for binding, compulsory arbitration, shows that disputes over changes are presumptively major disputes unless the carrier can satisfy either of the two limited exceptions set forth in Section 2 Seventh of the Act, 45 U.S.C. § 152 Seventh. *Chicago & North Western Ry. v. UTU*, 402 U.S. 570 (1971); *Detroit & Toledo Shore Line, supra*, 396 US. at 151. Conrail cannot show that it has complied with Section 6 of the Act, 45 U.S.C. § 156, before making the changes at issue, because it has not served the 30 day advance notice. Also, Conrail cannot show that the changes it has made are "in the manner prescribed in" its agreements because its asserted contractual right is not clear and patent. Since Conrail cannot show that it has satisfied either of the two exceptions in Section 2 Seventh against changes, it may not make the changes until either of two events occur: (1) it serves a notice under Section 6 and complies fully with the Act's bargaining processes; or (2) it obtains an adjustment board award sustaining its claim of contractual authorization. *Southern Ry. v. Brotherhood of Locomotive Firemen*, 337 F.2d 127 (D.C. Cir. 1964).

---

[11] *Hearings on S.3266 Before Senate Committee On Interstate Commerce*, 73rd Cong., 2d Sess. at 17 (1934) (Statement of Joseph H. Eastman.)

II. A second problem with Conrail's argument is that Conrail is incorrect in asserting that it has an arguable contractual right to make the changes involved in this dispute. To support such an asserted contractual right, Conrail has to show that rail labor has waived its fundamental right, guaranteed by Sections 2 First, 2 Seventh and 6 of the Railway Labor Act, to bargain before Conrail changes existing collective agreements. No such showing is possible here, because Conrail is attempting to use its medical fitness rules to bypass the limitations which its agreements with rail labor have placed upon Conrail's enforcement of Rule G. Thus, it is not plausible to believe that rail labor has agreed with Conrail that the carrier can arbitrarily control off-duty, non-employment related conduct, as Conrail is seeking to do here. If Conrail wishes to control such conduct, it must bargain with rail labor for rules that are mutually acceptable. Any other approach to Section 2 Seventh would nullify the Act's codification of the fundamental right of employees to be consulted prior to the implementation of a decision by management adversely affecting wages or working conditions.

ARGUMENT

I. Conrail's Addition Of A Drug Screen To the Urinalysis Component Of Its Routine Periodic, Return-To-Duty, and Follow-Up Physicals, And Its Decision To Treat Employees Who Test Positive For Drugs During Such Physicals Differently Than It Treats Employees Who Fail Such A Physical For Medical Reasons, Constitute Changes In Working Conditions As Embodied In Agreements And Thus Present A Major Dispute

Conrail's new drug testing procedures are a clear change in working conditions established by an agreement, and, thus, constitute a major dispute. Ignoring this fact and the fact that rail labor wishes to bargain with it over whether such changes should occur, and if so, under what circumstances and with what consequences, petitioner Conrail argues that it may

implement its new testing procedures without first reaching an agreement with rail labor on the concerns raised by respondents. According to Conrail, it has in the past unilaterally modified the type of tests which it has given to employees during routine physicals, and thus, it argues, it has at least an arguable contractual right to add a drug screen and, if an employee fails that routine drug test, to revoke that employee's seniority. Conrail confidently asserts that since rail labor disputes the existence of any such contractual right, this case presents nothing more than a dispute over Conrail's interpretation of its contractual rights, and thus presents a minor dispute, which is within the exclusive jurisdiction of the adjustment boards established by Section 3 of the Railway Labor Act, 45 U.S.C. § 153. Federal courts, Conrail argues, have no jurisdiction over this kind of a dispute. Moreover, it argues, the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, does not require that it refrain from changing the established working conditions until the dispute over its contractual authority is resolved, and thus, it can implement its new policies without first utilizing the Act's dispute resolution processes to adjust this dispute.

Respondents respectfully submit that Conrail's argument distorts the dispute resolution procedures of the Railway Labor Act by attempting to convert a dispute over whether and, if so, how rules and working conditions shall be changed, into one over nothing more than the interpretation of existing rights. Moreover, Conrail and *amici* are asking this Court to ignore a fundamental principle of this labor statute—*i.e.*, its status quo concept—and to construe the Act in such a manner that a carrier will be permitted to change existing rules or working conditions *before* the parties have exhausted the Act's dispute resolution procedures. Such a result, rail labor respectfully submits, is contrary to the terms of the Railway Labor Act, to its legislative history, and to prior decisions of this Court interpreting that Act and its judicially enforceable commands.

A. The Terms Of The Railway Labor Act And Its Legislative History Show That Congress Intended Disputes Concerning Changes In Rules Or Working Conditions To Be Resolved By Conferences And By Mediation; Such Disputes Are Not To Be Referred To Adjustment Boards

Disputes in the rail industry involving rates of pay, rules or working conditions have long been divided into two classes—first, disputes over changes in rates of pay, rules or working conditions; and second, disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions. This distinction between classes of disputes pre-dates the Railway Labor Act of 1926, 44 Stat. 577, and has been carried forward in that Act and in all subsequent amendments.

1. *The Initial Adjustment Boards*

During the Government's operation of the railroads during World War I, the Director-General of Railroads acted upon this distinction by providing two different mechanisms to settle the different classes of disputes. On April 30, 1918, Director-General McAdoo issued General Order No. 27 which established the Board of Railroad Wages and Working Conditions to hear and investigate disputes concerning changes to rates of pay, rules or working conditions. *See*, H.D. Wolf, THE RAILROAD LABOR BOARD at 18-19, 49 (Univ. of Chicago Press 1927). "This board was solely an advisory body and its findings and conclusions were incorporated in recommendations to the Director-General to be acted upon as he saw fit." *Id.* at 49-50. During this same time period, the Director-General established three "Railway Boards of Adjustment," one for each of three groups of crafts of employees. *Id.* at 50-52. Those boards were composed of equal numbers of representatives of the carriers and employees and were to "adjust" controversies "arising out of the interpretation and application of wage agreements, not including matters passed upon by the Rail-

road Wage Board."[12] *Id.* at 51. "A majority vote of all members of the Board was sufficient to approve a decision, and where it was impossible to obtain a majority vote, any four members of the Board might refer the matter to the Director-General for final decision." *Id.*[13]

When Congress returned the railroads to private control by the Transportation Act of 1920, 41 Stat. 456, it recognized generally this distinction between disputes. That Act created the Railroad Labor Board with authority to investigate and to report on unresolved labor disputes, including both disputes over changes and disputes over grievances. Sections 304, 307, 41 Stat. at 470-71. The adjustment board concept as a means to resolve grievances was continued, but Congress made the creation of adjustment boards purely voluntary with no

[12] Mr. Wolf described the method of handling disputes referrable to an adjustment board as follows (RAILROAD LABOR BOARD, *supra*, at 51-52):

> The method of procedure in bringing a case before the adjustment board was simple. Where "personal grievances or controversies" arose, the dispute was handled in the usual manner by general committees of the employees, up to and including the chief operating officer of the railroads or his representatives. If the matter were not settled there it was submitted to the chief executive of the organization of which the employee was a member, and if the employee's contention were approved, the matter was referred to the Director of the Division of Labor. He then referred it to [the appropriate Board]. . . .

[13] These boards were very successful in deciding disputes without deadlocking. As Director-General Hines explained in his Report:

> With a full practical knowledge of the problems, the members of these boards have approached their work with the desire to do justice and with the recognition of the importance of reaching an agreement. The result is that in the several thousand cases which have come before the three boards which have been created there has been an agreement in practically every case.

RAILROAD LABOR BOARD, *supra*, at 55, *quoting Report of Director-General for the Fourteen Months Ending March 1, 1920* at 15.

guidelines as to their composition or deadlock resolution procedures. Sections 302 and 303, 41 Stat. at 469-70. As explained in THE RAILROAD LABOR BOARD, *supra* at 267:

> In passing the Transportation Act, Congress fully expected that adjustment boards of some kind, presumably similar to those set up by the Railroad Administration, would be established and would become an integral part of the machinery for settling disputes. Both the House and the Senate bills, from which developed the Transportation Act, provided for such boards. The conference committee, to which the two bills were referred, likewise provided for adjustment boards in its preliminary draft, but upon the advice of Director-General Hines the mandatory provision was revised and the matter was left to the option of the carriers and the employees. That act as finally passed thus provided that adjustment boards might be established "by agreement between any carrier, group of carriers, or the carriers as a whole, and any employee or subordinate officials of carriers, or organizations or groups of organizations thereof."

However, primarily because of a dispute over whether national as contrasted with local boards should be established,[14] very few boards were established. *Id.* at 267-73. Several regional boards were established for operating employees (*id.* at 273-75), but overall, the adjustment board concept as a means to resolve grievances and interpretation issues was not implemented during the Rail-

[14] In 1920, the labor committee of the railroad's Association of Railroad Executives recommended that the Association agree to the creation of national boards of adjustment. One member of that nine-member committee dissented because, he asserted, national boards would encourage the organization of employees and increase the power of the national unions. The Association rejected the labor committee's recommendation, and opposed national boards. *See, Hearings on S. 2646 Before the Subcommittee of the Senate Committee on Interstate Commerce*, 68th Cong., 1st Sess. at 175-79 (1924).

road Labor Board era. According to Mr. Wolf (*id.* at 272-73):

> It was particularly unfortunate that the two sides were unable to adjust their differences in these conferences. The matter cropped up again and again in subsequent hearings before the [Labor] Board and was the cause of a great deal of bitterness between the carriers and the organizations. Of even more importance, the lack of adjustment boards of some kind resulted in a great number of minor cases coming before the Labor Board. These took up its time and attention and prevented it from giving the same deliberate consideration to the more important cases which it might otherwise have done. . . .

2. *Railway Labor Act of 1926*

For a variety of reasons, the labor provisions of the Transportation Act of 1920 proved ineffective and by the mid 1920s many were seeking a change. *E.g.*, *Elgin, Joilet & Eastern Ry. v. Burley*, 325 U.S. 711, 752 n.1 (1945) (Frankfurter, J., dissenting); RAILROAD LABOR BOARD, *supra* at 404-07.[15] In 1925, rail labor and the Association of Railway Executives entered into extended discussions on a proposed solution to the inadequacies of the Labor Board, and by January 1926, had drafted a bill which was then presented first to the President and then to Congress. RAILROAD LABOR BOARD, *supra* at 415-6.

[15] After months of drafting and soliciting comments from various sources, rail labor presented a bill to Congress which was submitted as the Howell-Barkley bill, S.2646, 68th Cong., 1st Sess., and H.R. 7358, 68th Cong., 1st Sess. Hearings were held on the Senate bill and it was modified by the Senate Committee on Interstate Commerce to add what is now Section 10 of the Railway Labor Act. The Howell-Barkley bill was not enacted, but it became the framework for the negotiations which resulted in the proposed bill submitted by both labor and management in 1926. THE RAILROAD LABOR BOARD, *supra* at 407-14. Consequently, respondents respectfully submit, the Senate Subcommittee hearings on S.2646 are instructive in understanding the intent of similar provisions in the 1926 Act.

That proposed legislation, without any substantive amendments, became the Railway Labor Act and essentially follows the earlier Howell-Barkley bill, as amended by the Senate Committee (*see*, note 15, *supra*), with certain exceptions. The most notable exception as relevant here is that the Howell-Barkley bill had proposed the creation of national adjustment boards; the 1926 Act, however, provided that "Boards of adjustment shall be created by agreement between any carrier or group of carriers, or the carriers as a whole, and its or their employees." Section 3 First, 44 Stat. at 578.

Like rail labor's earlier version, the Railway Labor Act of 1926 recognized that there were essentially two classes of disputes, the most troublesome of which were disputes over changes. Rail labor had proposed in 1924 that the carrier and employees be required to give thirty (30) days' advance notice of any intended change affecting rates of pay, rules or working conditions, and that no change be made until the controversy had been conferenced and, if one side requested or the Government wished, mediated.[16] In 1926, Congress followed the prior notice, negotiation, mediation and voluntary arbitration route for these disputes, essentially as had been proposed in the Howell-Barkley bill.[17] As had been proposed in the

[16] Rail labor maintained that the 30 days' advance notice and prohibition on unilateral changes were not novel concepts, for they followed principles established by the Railroad Labor Board and other legislation. *See, Hearings on S.2646, supra* note 14, at 16-17.

In 1921, the Railroad Labor Board had concluded that an essential "principle" of collective bargaining, and thus, respondents submit, one of the "reasonable efforts" which Section 301 of the Transportation Act of 1920 required in its hortatory provision that carriers adopt, was that: "The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management." Railroad Labor Board *Decision No. 119*, 2 R.L.B. Dec. 87, 96 (1921). That principle went on to provide that it would be satisfied by conferences. *Id.*

[17] One difference between Section 6 as enacted in 1926 and Section 6 of the Howell-Barkley bill was that the 1926 legislation did

Howell-Barkley bill, adjustment boards were to be given jurisdiction to consider unresolved "disputes . . . growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . . ." *Id.* at § 3 First (c), 44 Stat. at 578. And Section 3 of the 1926 Act, like the earlier version, was premised on the assumption that adjustment board members, being removed from the emotions present at the site of the dispute, would apply their expertise to the agreements in an impartial manner and resolve most disputes. *Hearings on S. 2646*, *supra*, at 18-19 (Statement of D.R. Richberg); *see also*, note 13, *supra*.

The 1926 Act, however, did *not* provide a procedure for the adjustment board to resolve deadlocks, but like the 1924 version, provided that deadlocked grievances could be referred to the Board of Mediation established by Section 5 of the Act; Section 5 First (a) provided that the following type of dispute could be referred to the Board of Mediation: "A dispute arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions not adjusted by the parties in conference and not decided by the appropriate adjustment board . . . ." 44 Stat. at 580.

Following the long-standing practice in the industry, the 1926 Act made *both* disputes over changes and disputes over grievances or interpretation questions subject to the general duty that the parties "exert every reasonable effort . . . to settle all disputes . . . ." Section 2 First, 44 Stat. at 577-78. Moreover, *both* types of disputes were subject to mediation if not resolved through conferences and, for grievance and interpretation disputes, through the adjustment board process. *Both* types of disputes which remained unresolved after mediation could be arbitrated, but only if both parties

---

not include the penalty provisions which were included in Section 6(B) of the Howell-Barkley bill.

agreed, and *both* classes of disputes could be investigated under the Emergency Board process of Section 10 of the Act. 44 Stat. at 582-586.

The fact that both classes of disputes were subject to the duties imposed by Section 2 First is important, because as this Court explained in *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 151 (1969) (footnote omitted), there is an "implicit status quo requirement in the obligation imposed upon both parties by § 2 First, 'to exert every reasonable effort' to settle disputes without interruption to interstate commerce." That status quo obligation, respondents respectfully submit, was an essential feature of the 1926 Act, and that feature has not been altered.

The Railway Labor Act of 1926 was a compromise, to which both rail labor and the carriers agreed, which both sides asserted would prevent labor disputes from reaching the point that an interruption of commerce would occur if the parties faithfully adhered to the terms of their compromise; as the railroads' spokesperson, Mr. A.P. Thom, informed Congress in 1926:

> We come here with the agreement. We come here with the implication by our coming that both parties are committed to this as a means of preventing interruption of transportation. And that every step in it must be pursued before there is an interruption of transportation. The labor men would not be able to justify their application for this measure if it would result in an interruption of transportation until every step in this bill had been pursued. *The carriers could not justify themselves in public opinion if they brought about a dispute which would interrupt transportation before following each step in this bill.*

Hearings on S. 2646 Before Senate Committee on Interstate Commerce, 69th Cong., 1st Sess. at 16 (1926) (Statement of A.P. Thom) (emphasis added). Rail La-

bor's spokesperson, Mr. Richberg, also emphasized the connection between the duty agreed to in Section 2 First and the status quo feature of the compromise:

> *As to maintaining the status quo from the time that a dispute is engendered, it is a violation of the duties imposed by this law for either party to take any action to arbitrarily change the conditions until that dispute has been adjusted in accordance with the law.* Their primary duty is to exert every reasonable effort to avoid interruptions of commerce through disputes. The "reasonable efforts" are set forth here that all disputes shall be considered and decided in conference, if possible; that, second, if conference fails a certain type of disputes shall be carried to the board of adjustment; the other type of disputes, or those not decided by the board of adjustment, may be carried to the board of mediators, and it shall be the duty of the board of mediators to act.

Hearings on H.R. 7180 Before House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. at 92-93 (1926) (Statement of D.R. Richberg) (emphasis added).

3. *1934 Amendments To Section 3 of Railway Labor Act*

While successful to a large degree in preventing interruptions to commerce, the Railway Labor Act of 1926 proved to have certain defects which prevented the resolution of many disputes.[18] As relevant here, one such defect was in the adjustment board process, for once again the parties had not been successful in establishing adjustment boards to the degree contemplated by the 1926 Act. *Hearings on S. 3266 Before Senate Committee On Interstate Commerce*, 73rd Cong., 2d Sess. at 15

[18] One major defect corrected by the 1934 legislation was the lack of any method in the 1926 Act to resolve disputes over employee representatives. That issue is not relevant here.

(1934) (Statement of Joseph B. Eastman).[19] Moreover, rail labor's expectation that the adjustment boards would operate as they did during the federal control period, resolving most grievances, proved incorrect; as Commissioner Eastman explained: "Not only are they [*i.e.*, deadlocks] possible, but they have occurred in a large number of cases, and of late there has been a continually growing tendency toward such deadlocks. The number now existing runs into the hundreds." *Id.* at 17. As Commissioner Eastman explained to Congress in 1934, the bill which his office had drafted and had submitted to Congress to amend the 1926 Act

> attempts to remedy both of these deficiencies in the present law. It provides for the creation of a National Adjustment Board to which unadjusted "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" may be enforced. *Please note that disputes concerning changes in rates of pay, rules, or working conditions may not be so referred, but are to be handled, when unadjusted, through the process of mediation.*

Hearings on S. 3266, supra, at 17 (emphasis added).

By 1934, the rail industry had developed the colloquial terms of "major" to refer to disputes over changes and "minor" to refer to disputes over grievances or interpretations. *See*, THE RAILROAD LABOR BOARD, *supra* at 50.[20] Indeed, when the hearings on the 1934 amend-

[19] Commissioner Eastman was a member of the Interstate Commerce Commission and the Federal Railroad Coordinator. This Court has recognized that Commissioner Eastman was "one of the weightiest voices before Congress on railroad matters . . . ." *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 304 (1954).

[20] In its First Annual Report, the Board of Mediation established by the 1926 Act, explained that disputes referred to it under Section 5 First(a) were given a different docket designation than were

ments are reviewed, it is clear that those terms were used essentially in their literal sense. *E.g., Hearings on S. 3266, supra,* at 158; *Hearings on H.R. 7650 Before House Committee on Interstate and Foreign Commerce,* 73rd Cong., 2d Sess. at 49-51 (1934). For example, the following exchange occurred between Mr. George M. Harrison, the Chairman of RLEA, and Senator Dill, the Chairman of the Senate Committee on Interstate Commerce (*Hearings on S. 3266, supra,* at 33-34):

> THE CHAIRMAN. Now, will you explain—I suppose I ought to know this, but I don't—just what kind of controversy is to be settled by these boards [*i.e.*, adjustment boards], and what kind by the boards of mediation. I haven't got it clearly in my mind.
>
> MR. HARRISON. I will be glad to. Being so familiar with the law, I probably didn't go into that as thoroughly as I ought to. There are two classes of controversies that develop. One is what we call major changes, when we attempt to write a new contract or to revise a contract covering wages, rules, and working conditions.
>
> THE CHAIRMAN. On all the railroad systems in the country?
>
> MR. HARRISON. That is right. Now, that is handled in this fashion: You have a conference with the officers of the railroad and endeavor to agree. If you are unable to agree then, either party has the privilege of invoking the aid and service of the United States Board of Mediation. The Board of—
>
> THE CHAIRMAN. (interposing). Will have under the law?
>
> MR. HARRISON. Yes; there is no change in that. Now, the other class of controversy is the disputes that arise out of the application of that agreement to the practical situation on the railroad. For instance, we may have a claim for time claiming that

given to the "major cases." It referred to the grievance cases as "minor cases." *See,* Annual Report of the United States Board of Mediation for Fiscal Year ended June 30, 1927, at 11.

> the rule of the contract should provide for the payment of so much. The railroad may dispute that and claim that they understand it to be another way. We may have a grievance concerning seniority of a man; we may have a grievance concerning the dismissal of a man, the promotion of a man, reduction of force. There are a thousand and one different kinds of controversies that can develop. Those are the controversies that will be settled by the national board. The parties in the first instance have agreed on the contract; they have laid down rules.

By agreeing to the National Railroad Adjustment Board, and in particular by agreeing to the provision in the proposed amendment to resolve deadlocks by arbitration (*see,* 45 U.S.C. § 153 First (l)), rail labor agreed to a form of compulsory arbitration. As Commissioner Eastman explained in response to a question as to whether the proposed amendments made it a matter of "duty" on the part of the parties to arbitrate deadlocks (*Hearings on H.R. 7650, supra,* at 58):

> COMMISSIONER EASTMAN. Yes; and it is my understanding that the employees in the case of these minor grievances—and that is all that can be dealt with by the adjustment boards—are entirely agreeable to those provisions of the law.
>
> I think that is a very important concession on their part. It does not go to the major issues with reference to wages and working rules; but to all disputes except working rules and wages.
>
> • • • •
>
> . . . The only jurisdiction that the adjustment board has is over these minor grievances.

Commissioner Eastman also emphasized the limitations which the proponents of the amendments clearly recognized were being placed on the adjustment boards' jurisdiction, when he stated (*Hearings on H.R. 7650, supra,* at 64) (emphasis added):

> [D]o not make any mistake about this: You have referred to wages. *The whole matter of working*

> *rules and conditions is not within the jurisdiction of this adjustment board. They have no right to determine what the working rules shall be. It is only the interpretation of whatever rules are agreed upon.* It is a question of interpreting them. It is minor matters of that kind, and not the questions either of wages or of working rules. *The basic matters are left for the processes of mediation.*

Congress accepted Commissioner Eastman's proposal and gave adjustment boards jurisdiction over "minor" disputes. Act of June 21, 1934, ch. 691, 48 Stat. 1185.

4. *Enactment of Section 2 Seventh*

At the same time Congress amended the Railway Labor Act to create the compulsory adjustment boards, it added Section 2 Seventh, 45 U.S.C. § 152 Seventh, which still provides as follows:

> No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner described in such agreements or in section 6 of this Act.

While the 1934 legislative history on this provision is very brief, that provision traces its origin to Section 77(o) of the Bankruptcy Act, as amended in 1933. Act of March 3, 1933, ch. 204, 47 Stat. 1467, 1481. Section 77(o) provided that (47 Stat. at 1481):

> No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees, except in the manner prescribed in the Railroad Labor Act, or as set forth in the memorandum of agreement entered into in Chicago, Illinois, on January 31, 1932, between the executives of twenty-one standard labor organizations and the committee of nine authorized to represent Class I railroads.[21]

[21] The Chicago Agreement provided for a 10% wage reduction for one year. It also provided that: "[T]his arrangement shall terminate automatically January 31st, 1933 . . . ." Memorandum of Agreement at 2 (on file with National Mediation Board). *See*, 76 Cong. Rec. 5118 (Feb. 27, 1933) (Remarks of Sen. Norris).

Three months after the Bankruptcy Act amendments were enacted, Section 77(o) was made applicable to all rail carriers by Section 7(e) of the Emergency Railroad Transportation Act of 1933, ch. 91, 48 Stat. 211, 214.[22] Since the Emergency Railroad Transportation Act was a "temporary measure," Commissioner Eastman proposed that the substantive provisions of Section 7(e) be included in the 1934 amendments to the Railway Labor Act (*Hearing on S.3266, supra*, at 13); Congress agreed. Thus, the legislative history of the 1933 amendments is instructive in construing the intent of Section 2 Seventh of the Railway Labor Act.

The "labor amendments" to the 1933 Bankruptcy Act amendments were proposed in the Senate by Senator Norris, essentially to make explicit what Congress considered to be already included in existing laws. 76 Cong. Rec. 5118 (Feb. 27, 1933); *see also*, 76 Cong. Rec. 5358 (March 1, 1933) (Remarks of Rep. Parker). Two months later, during the hearings on the Emergency Railroad Transportation Act of 1933, rail labor proposed that the bill be amended to include provisions that would insure the protection of labor's rights under the Railway Labor Act, as those rights had been intended to be protected by the 1926 legislation. One clarification which rail labor sought was that:

> No bulletin, notice, or other method of changing contractual requirements or the established inter-

[22] Section 7(e) provided that: "Carriers, whether under control of a judge, trustee receiver, or private management, shall be required to comply with the provisions of the Railway Labor Act and with the provisions of section 77, paragraphs (o), (p) and (q), of the Act approved March 3, 1933," *i.e.*, the 1933 Bankruptcy Act amendments. Section 77(p) and (q) of the Bankruptcy Act dealt with "yellow dog contracts" and discrimination because of union membership. 47 Stat. at 1481.

> pretation or application of an existing contract between a carrier and its employees or fixing wages or working conditions without an agreement between a carrier and its employees, shall be effective unless made after compliance with the requirements of the Railway Act and particularly as set forth in sections 2 and 6 thereof.

Hearings on S.1580 Befor the Senate Committee on Interstate Commerce, 73rd Cong., 1st Sess. at 101 (1933) (Statement of Donald R. Richberg).[23] After quoting the above proposal, Mr. Richberg explained that Congress should clarify its original intent, because (*id.*):

> We have had that experience during this entire period of the depression, the use of the depression as an excuse more or less for the continuing disregard of the requirements of the Federal law, affecting notices, bulletins, announcing changes in position, announcing such changes as would involve moving of 100 men from their homes, notices of consolidation, changing their hours and changing their positions. We have had a state of guerilla warfare all over the United States of that character and it is about time to stop.
>
> SENATOR LONG. What did you say brought that about?
>
> MR. RICHBERG. In the desire to create economies and the necessity of economy during the depression, we have had simply disregard of the requirements of the law and the arbitrary changing of working conditions for men all over the country, as a part of these consolidations. . . .[24]

---

[23] The "amendments" proposed by rail labor were actually "comments in the form of proposed amendments to express clearly our ideas, without any assumption that these are expressed in the best form for legislative use." *Hearings on S.1580*, *supra*, at 78 (Statement of D.R. Richberg).

[24] Shortly after making that statement, Mr. Richberg explained that no change could be made until after the parties had complied with the labor statute, but added that this was correct "so far as it involves change in existing contractual relations, not so far as it is entirely within the scope of it, no. There is no requirement that they have to have notice of everything to be done within the scope of the existing contract." *Hearings on S.1580* at 101.

Although Congress did not include the specific language proposed by Mr. Richberg during his testimony, the substance of all of those proposals, according to the legislation's supporters, was included in the bill passed by Congress. 77 Cong. Rec. 4256 (May 26, 1933); 77 Cong. Rec. 4870 (June 2, 1933).

In 1934 Commissioner Eastman proposed the following language be included in the Railway Labor Act as Section 2 Seventh in order to add to that Act the substantive requirements of Section 77(o): "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, except in the manner prescribed in section 6 or in other provisions of this Act relating thereto." *Hearings on S.3266*, *supra*, at 3.

During the hearings before the Senate Committee on Interstate Commerce, the carriers' representative, W.M. Clement, proposed that Commissioner Eastman's language be amended to read as Section 2 Seventh presently does for the following reason: "This is proposed because the working conditions are not defined in the act. They are covered by agreement, and we believe this is a helpful suggestion." *Hearings on S.3266*, *supra*, at 65. Mr. Clement also suggested that Section 6 of the 1926 Act be amended to add "in agreements" after the word "change" in the first sentence "for definiteness and clarity." *Id.* at 73.

Commisisoner Eastman stated that the amendments were acceptable to him; the Section 2 Seventh amendment, he stated, was "an improvement, and should be made" (*id.* at 151), and the Section 6 amendment was one he "favored." *Id.* at 155. Congress adopted both modifications.

5. *Relationship Between Section 2 First And Act's Dispute Resolution Procedures*

It is axiomatic that the various provisions of the Railway Labor Act must not be read in isolation, but rather, as part of an integrated Act so as to give meaning to the design of the statute as a whole. *E.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-21 (1986); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956). This principle is clearly applicable to construing the relationship between Section 2 First of the Railway Labor Act and the dispute resolution procedures which resulted from the 1934 amendments to the labor statute.

Section 2 First, as this Court has noted on several occasions, is the "heart" of the Act. *Chicago & North Western Ry. v. UTU*, 402 U.S. 570, 574 (1971). The duty imposed by that section to exert *every reasonable effort* to settle all disputes, this Court has also observed, must be read in conjunction with the status quo concept which is "central" to the Act's design. *Detroit & Toledo Shore Line R.R. v. UTU*, *supra*, 396 U.S. at 150-51.

Indeed, respondents respectfully submit, it is this status quo obligation that makes the Railway Labor Act unique, for the overriding concept behind the compromise which rail management and rail labor agreed to in 1926 was that neither side would do anything to bring abut an interpretation of commerce until they had complied with the Act's dispute resolution processes. *E.g., Hearings on S.2306*, *supra*, at 16 (Statement of A.P. Thom). Changing existing agreements was clearly recognized as involving grave dangers to maintaining uninterrupted commerce. *Hearings on H.R. 7180*, at 93. Thus, as Mr. Richberg explained in 1926 (*see, Hearings on H.R. 7180*, *supra*, at 92-93), maintaining the status quo by not changing working conditions is one of the "reasonable efforts" which the Act requires the parties to "exert" in order "to settle all disputes." 45 U.S.C. § 152 First.

When Section 2 First is read in conjunction with the amendments which Congress made in 1934—which, except for the compulsory arbitration feature for minor disputes, were not intended to "introduce any new principles into the . . . Railway Labor Act, but . . . [were] designed to amend that act in order to correct the defects which ha[d] become evident as a result of 8 years of experience" (H. Rpt. No. 1944, 73rd Cong., 2d Sess. at 2 (1934))—it is clear that the National Mediation Board [hereinafter, "NMB"] accurately described the functioning of the Act when it stated as follows in its First Annual Report:

> While the obligatory conferences are being held, or while a dispute is in the hands of the National Mediation Board, "rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon" by the Board in accordance with the act. *Further responsibilities and obligations are placed on both parties* in connection with disputes involving grievances and the interpretation or application of agreements. All such disputes, if they cannot be settled by the parties in conference, are referable to what is in effect an industrial court, the National Railroad Adjustment Board, and the parties are obligated to obey its decisions. *Similar responsibilities and obligations are assumed* when arbitration in accordance with the provisions of the act is agreed upon by both parties.

First Annual Report of NMB for the Fiscal Year Ended June 30, 1935 at 3 (emphasis added)[25]

---

[25] Dean Garrison has described the National Railroad Adjustment Board as a "quasi-judicial body" whose cases "consist of concrete claims like those presented to any court of law . . . ." L.K. Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 567-68 (1937). Dean Garrison also noted that when the adjustment board's were made mandatory (*id.* at 576):

> The mistake was not made, as in the case of the old United States Railroad Labor Board, of mixing with the judicial duties,

B. This Court Has Emphasized That Federal Courts Play An Important Role In The Orderly Administration Of The Railway Labor Act

When Congress enacted the Railway Labor Act in 1926, it abandoned the approach which it had taken in enacting the labor provisions of the Transportation Act of 1920 which had not provided for legal obligations enforceable by the judiciary. *E.g., Pennsylvania Railroad System v. Pennsylvania R.R.*, 267 U.S. 203, 215-17 (1925). Instead, the Railway Labor Act clearly imposes certain legal obligations upon both the railroads and the employees which may be enforced by the federal courts. *E.g., Chicago & North Western Ry. v. UTU, supra*; *Texas & New Orleans R.R. v. Brotherhood of Railway Clerks*, 281 U.S. 548 (1930). Some obligations, however, are not enforceable in the courts, but must be vindicated through the administrative processes established by the Act. *E.g., General Committee of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323 (1943); *Switchmen's Union v. NMB*, 320 U.S. 297 (1943). In determining which duties are enforceable by the federal courts, this Court has stated that (*Chicago & North Western, supra*, 402 U.S. at 578):

> Our cases reveal that where the statutory language and legislative history are unclear, the propriety of judicial enforcement turns on the importance of the duty in the scheme of the Act, the capacity of the courts to enforce it effectively, and the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory.

In the case at bar, petitioner Conrail and the *amici* who support it, argue that Congress has given the adjustment boards exclusive jurisdiction over all disputes where a contract interpretation issue has been raised, and federal courts may not interfere to prevent the carrier from altering the status quo pending resolution of that dispute. Respondents respectfully submit that Conrail's argument is incorrect, for it exalts the jurisdiction of adjustment boards to decide contract interpretation issues beyond all reason, while at the same time it belittles the important role which the federal courts must perform to enforce the Act's bargaining and status quo obligations in disputes involving *changes* in existing collective working conditions.

---

the duty of passing upon disputes regarding wages and desired changes in agreements.

In this regard, we emphasize at the outset that there is no dispute in this case over the principle that the 1934 amendments to the Railway Labor Act gave the adjustment boards exclusive jurisdiction to decide authoritatively disputes "growing out of grievances or out of the interpretation or application of agreements" which have not been resolved in conference. *E.g., Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320 (1972). There is no dispute in this case, either, over the concept that "[f]ederal courts have broad powers to enjoin unilateral actions by either side." Conrail Brief at 16.

Nor do respondents dispute the eqiutable concept that a federal court called upon to enforce the bargaining and status quo obligations of the Railway Labor Act in a case where there is no showing of irreparable injury if injunctive relief is not granted, "should exercise equitable discretion to give . . . [the adjustment boards] the first opportunity to pass" on the question of whether a carrier's action involves *a change in working conditions* where both sides are relying upon arguable and previously unresolved interpretations of their contracts to justify their positions. *E.g., Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567 (1946).[28] In such a

---

[28] *Pitney* involved a jurisdictional dispute between two labor organizations claiming the contractual right to perform certain work inside a railroad yard. The petitioning labor organization relied upon a 1940 contract and past practice to justify its claim that the Trustees had changed their working conditions by giving cer-

case, the exercise of discretion by deferring to the adjustment board process is warranted, for the board has jurisdiction to resolve the *entire* dispute, with the ability to give *full relief* to either party who ultimately prevails.[27] *E.g., Transportation-Communications Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966).

However, deference to the adjustment board process, respondents respectfully submit, is not warranted in a case involving a clear change in working conditions where the carrier relies upon a disputed contractual right or a new interpretation of an established and well understood agreement to justify the change. In such a case, the controlling feature of the controversy for dispute-classification, and thus for jurisdictional purposes, should be, we submit, the change itself.

In this case, there is no dispute over whether Conrail is *changing* working conditions covered by a collective understanding, for as all have acknowledged, Conrail's new testing and enforcement procedures have changed the working conditions established by agreement. J.A. at 121-22. Instead, the issue which Conrail claims makes the entire dispute "minor," is its contention that the past

---

tain work inside the yard to the other organization. 326 U.S. at 562-63. The other organization, however, relied primarily upon an agreement in 1929 fixing the yard limits and an agreement in 1943, which in its opinion ended the violation of the earlier agreement by giving it explicitly the right to the disputed work, to assert that it had the contractual right to the work. Brief for Brotherhood of Railroad Trainmen in No. 37, 1945 Term, at 9.

[27] Although this Court initially left this issue open, *BLE v. Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 531 n.3 (1960), it is now accepted that federal courts have equity jurisdiction, independent of their qualified jurisdiction to enjoin a threatened strike over a minor dispute, to preserve the status quo in a minor dispute where, if the status quo is not preserved, an adjustment board's decision "in the unions' favor would be but an empty victory" because of the irreparable harm which would have befallen the employees in the interim. 363 U.S. at 534; *see also, NRLC v. IAM*, 830 F.2d 741, 749 (7th Cir. 1987).

practice gives it the contractual right to make these changes unilaterally—*i.e.*, its contention that the changes are being made "in the manner prescribed in such agreements." 45 U.S.C. § 152 Seventh. Thus this case involves a hybrid, presenting both a clear change and a disputed contractual justification for such a change.

As we show in Argument II, *infra*, the appellate court was correct in concluding that Conrail's contractual justification is not plausible in this case, and, thus, does not require that the federal courts decline to exercise their jurisdiction until after Conrail's contract claim is presented to an adjustment board for resolution.[28] However, respondents respectfully submit, this Court need not address the Third Circuit's application of the standards developed by the appellate courts for distinguishing between major and minor disputes, for those standards are inapplicable to hybrid disputes, such as this one, where it is plain that changes in working conditions have occurred.[29]

---

[28] Rail labor respectfully submits that either party has the absolute right to submit for adjustment under Section 3 of the Act *any* grievance or claim involving the interpretation or proper application of an agreement which has been conferenced in the usual manner, but which remains unresolved, even if that grievance or claim appears to be frivolous. This principle is firmly established under the National Labor Relations Act [hereinafter, "NLRA"], 29 U.S.C. § 151, *et seq.* (*e.g., AT&T Technologies, Inc. v. CWA*, 475 U.S. 643, 649-50 (1986)), and there is no reason why it should not be applicable to the duties imposed by Sections 2 First and 3 First(i) of the Act to exert every reasonable effort to settle all disputes. However, as we explain below, the fact that a carrier has an absolute right to have a frivolous claim heard by an adjustment board does not deprive the federal courts of jurisdiction to enforce Section 2 First, 2 Seventh and 6 of the Act.

[29] Respondents did not challenge below the proper standard to be applied in determination whether the underlying controversy is a major or a minor dispute. However, since this Court will necessarily be deciding that issue in addressing petitioner's question, respondents are setting forth the test which they submit the Act requires be employed.

C. When A Unilateral Change In Working Conditions Fixed By Agreements Is Being Made, The Carrier Must Show A Clear And Patent Contractual Right To Make Such A Change Before The Federal Courts Should Surrender Their Jurisdiction Over the Dispute To The Adjustment Boards

Central to both Conrail's and the *amici*'s arguments that the "arguable" and "obviously insubstantial" test is appropriate, is their contention that this test accomplishes the goal of the Railway Labor Act in requiring that disputes involving contract interpretation issues "be resolved through binding arbitration, without resorting to economic self-help in the form of strikes." Conrail Brief at 35. What Conrail and the *amici* ignore, however, is that under their application of Act's dispute resolution processes, they achieve their goal at the expense of the status quo obligation, for in their view a carrier is free to change the established working conditions both before and during the adjustment board process. Fortunately, such a one-sided view of the Railway Labor Act's status quo requirement is not what is mandated by the Act.

As this Court observed in *Detroit & Toledo Shore Line R.R. v. UTU*, *supra*, 396 U.S. at 150 (emphasis added), while stating that the Act's status quo requirement "is central to its design:" The status quo requirement's "immediate effect is to prevent the union from striking *and management from doing anything that would justify a strike.*" Prohibiting rail labor from striking while allowing the carrier to change working conditions *without a clear contractual right* does not apply the status quo concept evenly, and thus, is inconsistent with the Railway Labor Act's most basic purposes.

A second fallacy in Conrail's and the Government's position is that they fail to recognize that a contract interpretation question can be present in a dispute over changes.[30] Indeed, such a hybrid controversy arises

[30] In its Second Annual Report, the Board of Mediation stated: "In several instances, . . . during the mediation of wages and rules

whenever a carrier relies either on a written agreement or, as is more typical today, on past practice to assert that the disputed change is in the manner prescribed by the agreement. The fact that a contract interpretation issue is present in a dispute over changes should not *a fortiori* control the characterization of the dispute as a whole. This point is well illustrated in one of the only decisions by this Court in which the Court was called upon to characterize a dispute, *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330 (1960).

In the *Telegraphers* case, the railroad sought State regulatory authority to close certain stations and to consolidate the work of its agents who were represented by the Telegraphers. The Telegraphers, in turn, served a notice on the railroad to amend its rules agreement to add a provision that would prohibit the carrier from abolishing any agent job, except by agreement. 362 U.S. at 332. Besides asserting that the subject matter of the union's bargaining proposal was not bargainable, the railroad also asserted that the union was barred by a moratorium clause[31] in a recently concluded national agreement from serving the disputed Section 6 notice. Brief for *Chicago & North Western Ry.* in No. 100, 1959 Term, at 20-21. The railroad invoked the jurisdiction of the adjustment board to resolve its contractual defense and asserted in court that the pendancy of its adjustment board claim made the dispute minor and, thus, made the union's threatened strike enjoinable. *Id.* at 21. This Court rejected that minor dispute characterized as follows (362 U.S. at 341):

differencies, contingent or related grievance matters have been adjusted." Annual Report of United States Board of Mediation for the Fiscal Year Ended June 30, 1928 at 11.

[31] Moratorium clauses in the rail industry are typical in the National Agreements which govern many aspects of rail labor relations, and provide that, for a certain period of time, neither party to the agreement will serve a Section 6 notice on subjects settled by the agreement.

> Only a word need be said about the railroad's contention that the dispute here with the union was a minor one relating to an interpretation of its contract and therefore one that the Railway Labor Act requires to be heard by the National Railroad Adjustment Board. We have held that a strike over a "minor dispute" may be enjoined in order to enforce compliance with the Railway Labor Act's requirement that minor disputes be heard by the Adjustment Board. . . . But it is impossible to classify as a minor dispute this dispute relating to a major change, affecting jobs, in an existing collective bargaining agreement, rather than to mere infractions or interpretations of the provisions of that agreement. . . .

Like the dispute in *Telegraphers*, it is impossible to classify as minor this dispute which relates to whether Conrail's alteration of the established agreements by testing for drugs without some cause, and its new rule of revoking an employee's seniority for the use of controlled substances while off-duty, should be part of the employees' collective rules. Moreover, it is impossible to classify as minor the dispute over rail labor's desire to negotiate with Conrail concerning whether such testing should occur, and if it is to occur, under what conditions the tests may be administered and with what consequences to employees.

This is so because the record is quite clear that there are no agreements on those points in force at the present time. Thus, the dispute presented by this case is clearly one over the imposition of new employment terms, rather than one involving the enforcement of existing agreements. The resolution of this dispute has thus "been left for settlement entirely to the processes of noncompulsory-adjustment." *Elgin, Joliet & Eastern Ry. v. Burley*, *supra*, 325 U.S. at 724.

Conrail's assertion that this case *involves solely* a contract interpretation issue because it *claims a contractual right to change the working conditions*, ignores both the language of the statute and the reality of the contro-

versy. If Conrail had not made the changes, but had simply asserted a right to do so, then the dispute would have been solely one over the validity of its contractual rights. However, it went further and it implemented the changes. This thus brought into question the issue of whether Conrail, by making those changes, had violated Sections 2 First, 2 Seventh and 6 of the Act. This Court has recognized that the federal courts are the sole tribunal available to enforce those important commands of the Railway Labor Act (*e.g., Chicago & North Western Ry. v. UTU*, *supra*), and therefore, the question of whether the federal courts must exercise that jurisdiction turns on "the necessity for judicial enforcement if the right of the aggrieved party is not to prove illusory." *Chicago & North Western*, *supra*, 402 U.S. at 578.

In this case, unless Conrail is restrained from implementing the changes, the protections which Congress has given to the collective bargaining process by prohibiting changes until the bargaining process had been completed, will be lost. No adjustment board will ever be able to require Conrail to redo the testing which will have occurred in the interim without the safeguards which rail labor submits are necessary and wishes to negotiate.

Congress foresaw this problem and it declared in 1933 and then again in 1934 when it added Section 2 Seventh, that no change in working conditions as established by agreements shall be made, "except in the manner prescribed in such agreements or in section 6 of this Act." 45 U.S.C. § 152 Seventh. That statutory provision, thus, sets forth the elements which apply in determining whether the federal courts must exercise their jurisdiction lest a failure to act results in the sacrifice or obligation of rights which Congress created in the Railway Labor Act. *Order of Railway Conductors v. Pitney*, *supra*, 326 U.S. at 566. Since Conrail's claim that it has a contractual right to make the changes is not clear and patent, it cannot meet the burden which Section 2 Seventh of the Act places upon it to establish that the change is "in the manner prescribed" in the agreement. Moreover,

respondents respectfully submit, Conrail will not be able to meet that burden of proof until Conrail obtains a final and binding award from an adjustment board establishing the validity of its claim. Indeed, as we show in Argument II, *infra*, Conrail will never obtain such an award.

Respondents respectfully submit that this interpretation of the burden of proof established by Section 2 Seventh of the Act, rather than the virtually non-existent burden established by the "arguable" test,[32] protects the essential features of the labor statute. It maintains the central design of the Act by prohibiting *either* disputant from changing working conditions unilaterally—the type of act which the drafters of this legislation clearly recognized was the most likely to cause interruptions to commerce. It requires the parties to utilize the Act's dispute resolution procedures before altering working conditions, thus requiring them to "exert every reasonable effort . . . to settle all disputes. . . ." 45 U.S.C. § 152 First. And it does not infringe upon either the exclusive jurisdiction of adjustment boards or a carrier's contractual rights; adjustment boards retain their jurisdiction to decide the contract interpretation issue, and the carrier is given the option of submitting its contract claim to an adjustment board or of bargaining.[33] This

[32] Contrary to Conrail's and *amici*'s assertions (*see*, Conrail Brief at 33), the appellate courts are not all in agreement on the "arguable" test. First, the application of that standard with the resultant labelling of the dispute as being "major" or "minor" is usually conclusory. *Compare, Chicago & North Western Transportation Co. v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, Sup. Ct. No. 88-464 (Nov. 28, 1988), *with, Burlington Northern R.R. v. UTU*, 848 F.2d 856, 864 n.9 (8th Cir. 1988). And second, there is currently much confusion as to how that test should be applied in a hybrid case involving both a clear change and a contract interpretation issue. *See, ALPA v. Eastern Air Lines, Inc.*, D.C. Cir. Nos. 88-7201, *et al.*, filed January 10, 1989 denying *en banc* consideration.

[33] Rail labor submits that just as a court may condition a strike injunction in a minor dispute by requiring the carrier to preserve the status quo, so, too, may a court enjoining a carrier's alteration

approach to Section 2 Seventh is that reached by the court of appeals in *Southern Ry. v. Brotherhood of Locomotive Firemen*, 337 F.2d 127 (D.C. Cir. 1964), and, we sumbit, is the one intended by Congress.

II. Contrary To Conrail's Assertions, The Third Circuit Did Not Misapply Fundamental Principles Of The Railway Labor Act When It Concluded That Conrail's Claim That It Had A Contractual Right To Alter Unilaterally The Drug Testing Rules Was Not Plausible

Confidently asserting that it has at least an arguable contractual right to alter the drug screening rules without first bargaining, Conrail argues that the Third Circuit fundamentally misapplied well-settled standards in not recognizing that Conrail's purported contractual justification was at least "arguable," thereby making this dispute one within the exclusive jurisdiction of the adjustment boards. As we have explained above, however, Conrail is incorrect in believing that the "arguable" or "obviously insubstantial" test is an appropriate standard to determine whether a dispute concerning a clear change in working conditions should be classified as a major or a minor dispute. But even under the standard advocated by Conrail, petitioner is still not able to bypass the Act's bargaining and status quo obligations because it is simply not plausible to conclude that rail labor has agreed to the changes implemented by Conrail.

To support its argument that it has the contractual right to make the changes in its drug testing procedures without first complying with the Railway Labor Act's major dispute resolution procedures, Conrail points to its past practice of "unilaterally establishing fitness for duty medical standards and related physical examinations . . . ." Conrail Brief at 24. Similarly, Conrail asserts,

of the status quo in enforcing Section 2 Seventh require the moving party to agree to an expedited adjustment board process under Section 3 Second of the Act, 45 U.S.C. § 153 Second.

it has required routine periodic, return-to-duty, and follow-up physicals and it "has altered and amended the components of these examinations from time to time without any bargaining or request to bargain by the Unions." *Id.* at 25. Because the unions have not objected in the past to its alteration of standards and tests, Conrail argues, it has the implied contractual right to include, without first bargaining, a drug screen as a part of all physicals and to discharge an employee who is found to have traces of drugs in his or her system who subsequently fails to remove those substances from his or her body.

In relying solely upon the union's prior silence to argue that it has an implied contractual right to alter the testing procedures unilaterally, Conrail fails to recognize the crucial difference between contractual rights and the "actual, objecitve working conditions and practices, broadly conceived," which the Railway Labor Act's status quo obligation requires be preserved during a major dispute. Contrary to Conrail's belief, the two are not synonymous, for the status quo obligation extends far beyond contractual rights or prohibitions, and ercompasses established practices, *broadly conceived*, which are in dispute. *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 152-53 (1969). This distinction is important because Conrail looks to this Court's explanation of the manner in which a court should consider prior alterations of working conditions and practices *in determining what working conditions constitute the status quo* (396 U.S. at 153-54), and relies upon *that* explanation to justify its assertion of an implied contractual right here. Conrail Brief at 19-20.

Respondents respectfully submit that those are essentially two fundamental errors in Conrail's position. First, a finding of acquiescence for status quo determinations is *not* the same as a finding that an implied contract exists waiving the right to bargain, for before a past practice can be considered to be binding as a contract, "such past practice must be unequivocal; tacitly or mutually agreed upon; clearly enunciated and acted upon; and long standing as a fixed and established practice accepted by both sides without objection or repudiation." Special Board of Adjustment No. 1018, Award issued December 15, 1988 at 17a (reproduced as Appendix A to Petition for Rehearing in No. 88-464, *RLEA v. Chicago & North Western Transportation Co.*). And second, Conrail's argument emasculates the status quo obligation, for it is attempting to turn what is in actuality an argument as to what working conditions constitute the status quo into a minor dispute which, it then asserts, must be resolved by an adjustment board even if, as here, it is clear that the status quo does not include its right to change the established contractual requirement that drug testing occur only when there is some form of cause.

Besides attempting to change a status quo argument into a minor dispute, Conrail's argument, that it has an implied contractual right to change the drug testing rules unilaterally, ignores the crucial fact that the changes which are at issue in this case merge its fitness for duty determinations with the prohibition against the use of drugs while on duty or subject to call. Conrail and the unions have previously recognized the distinction between the two, for the implied agreements permit testing for drugs during a routine physical, if there is some form of cause—*e.g.*, having been taken out of service for drug usage, or "judgment" of examining physician that employee may have been using drugs. J.A. at 69. Moreover, under the implied contracts dealing with Conrail's medical fitness determinations, employees who fail a physical for medical reasons are not discharged, but are simply taken out of service until the physical condition is corrected. J.A. at 70. Under the new rules, the employees who test positive for drugs during these routine physicals lose their seniority if they do not "provide a negative drug test" within specified time periods. J.A.

at 70. In short, under Conrail's new drug testing rules, the carrier is now regulating the employee's private life by prohibiting the use of controlled substances while off-duty and not on-call.

This merger of two rules, according to the court of appeals, was dispositive of Conrail's implied contract claim, because it showed that it was not "plausible to believe that there was in fact a meeting of the parties' minds on the general issue." J.A. at 125. As the appellate court explained (J.A. at 126-27):

> If we were to accept Conrail's argument that its prior medical testing justified the drug screen, it would expand the scope and effect of medical testing beyond that of Rule G, the disciplinary rule aimed specifically at substance abuse. . . .

Conrail argues that the court of appeals erroneously rejected its arguments because it "mistakenly" required Conrail to show that there had been a "meeting of the minds" on drug testing, and then weighed the contentious nature of the drug testing issue with the absence of a specific agreement on drug testing to support its conclusion that it was not plausible to believe that there had in fact been a meeting of the minds on drug testing. Conrail Brief at 26. Contrary to Conrail's argument, the Third Circuit did not intrude upon the jurisdiction of the adjustment board when it examined the record to determine if it was plausible to believe that there had been a meeting of the minds, because a "meeting of the minds" on these changes is exactly what Conrail has to show in order to justify its assertion that the changes which it made were "in the manner prescribed" in its agreements with rail labor. 45 U.S.C. § 152 Seventh.

One of the fundamental precepts of the Railway Labor Act is its codification of the Railroad Labor Board's principle that "[t]he right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by

management" (*Decision No. 119*, 2 R.L.B. Dec. 87, 96 (1921)) with the strengthening of that right by requiring thirty days advance notice and the maintenance of the status quo during that bargaining process. The sole exception which Congress made to that judicially enforceable obligation is the recognition in Section 2 Seventh that a carrier need not give notice and bargain *if* the parties had previously agreed that the change in working conditions could be made—*i.e.*, that the parties' right to the subsequent compliance with Sections 2 First, 2 Seventh and 6 had been waived.[34] *See*, note 21, *supra*.

Obviously, to show such a prior understanding, there must be a meeting of the minds on the subject matter of the change, or at least some other indicia of an agreement concerning that subject matter. However, the court of appeals correctly observed, there is no objective showing in this record of any such waiver on non-cause drug testing, and thus it is implausible to believe that the changes made by Conrail were in the manner prescribed in the agreements.[35] Indeed, Conrail itself has asserted

---

[34] Indeed, rail labor respectfully submits, because the prior notice and bargaining rights enforced by Section 6 of the Act are so crucial to the Act's scheme, it logically follows that this waiver must be shown by "clear and unmistakable" evidence as is the case with waivers of statutory rights under the NLRA. *E.g., Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). Contrary to Conrail's assertions (Conrail Brief at 34), this approach to Section 2 Seventh does not reflect a lack of understanding for the differences between the two labor statutes; rather, it reflects the understanding that the Railway Labor Act is designed to prevent the *need* for interruptions to commerce by strengthening the collective bargaining process, the same goal which the "clear and unmistakable waiver" doctrine fosters under the NLRA. *E.g., Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280-84 (1956).

[35] *Amicus* National Railway Labor Conference [hereinafter, "NRLC"] argues that Conrail had the unilateral right to change its drug testing rules because there was no evidence in this case that "Conrail agreed *not* to revise its" drug testing rules. NRLC Brief at 18 (emphasis in original). That argument is specious, for it is not Conrail's agreement, but the Railway Labor Act, which pro-

that: "The record is devoid of evidence that the Unions ever sought bargaining over the drug testing techniques and protocols related to such examinations." Conrail Brief at 28 n.20. Since those techniques and protocols are, in rail labor's view, so crucial for a fair general testing policy (*see*, J.A. at 56-62), it is simply absurd to assert that rail labor has previously agreed to give Conrail carte blanche to nullify the Rule G enforcement rules through its medical testing rules.

Conrail, nevertheless, seeks to downplay this clear failure of proof by pointing to decisions by the Seventh[36] and Eighth[37] Circuits on almost "identical" facts, where the courts held that the addition of a drug screen to routine physicals presented a minor dispute.[38] Conrail

---

hibits the change. Moreover, that argument is premised upon the false assumption that the medical examination and Rule G enforcement rules are not agreements; that assumption is contrary to the findings below that those rules are an implied agreement (J.A. at 110, 121) and to 45 U.S.C. § 152 Seventh's legislative history that Section 2 Seventh was intended to apply to collective working conditions. *See*, page 29, *supra*.

Amicus NLRC also asserts that drug testing is not a mandatory subject of bargaining under the Railway Labor Act. NRLC Brief at 20-25. That argument is also specious. First, the Railway Labor Act does not draw a distinction between mandatory and permissive subjects of bargaining, and in view of the lack of any expert agency designed by Congress to develop such nuances under this statute, it is doubtful that Congress intended to draw such a distinction. And second, drug testing is and has long been a subject of bargaining under the Act (J.A. at 58-59, 63-64), and since it clearly has the potential to affect employment rights, either party must bargain over the subject if the other insists. *Order of Railroad Telegraphers v. Chicago & North Western Ry.*, 362 U.S. 330, 338 (1960).

[36] *RLEA v. Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987).

[37] *BMWE, Lodge 16 v. Burlington Northern R.R.*, 802 F.2d 1016 (8th Cir. 1986).

[38] *But see, BLE v. Burlington Northern R.R.*, 838 F.2d 1087 (9th Cir. 1988), *pet. for cert. pending*, Sup. Ct. No. 87-1631 (post-incident testing).

Brief at 21. Respondents respectfully submit that the simple answer to Conrail's reliance on those cases is that those decisions were erroneous. In both cases, the appellate courts acknowledged that the drug screening constituted changes in agreements, but the courts opined that the changes were either not so "drastic" (833 F.2d at 706) or amounted to, "at the most, . . . only a minor change in working conditions" (802 F.2d at 1023) so that they were simply "minor disputes." With all due respect, the Railway Labor Act does not draw a distinction between minor and major *changes*, for Section 2 Seventh prohibits *all* changes in agreements, except those made in the manner prescribed in the agreements or in Section 6 of the Act. *E.g., Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711, 722-25 (1945). It is up to the party being affected by the change, and not the courts, to decide whether, in its opinion the change is so "drastic" or "major" that it will exercise its statutory right to bargain over that proposed change.

In short, the Third Circuit properly concluded that Conrail's argument that it had an implied right to merge its medical fitness standards with its enforcement of Rule G, is simply not plausible.[39]

---

[39] Although the Third Circuit regarded it as "particularly significant" that the General Counsel for the National Labor Relations Board has taken the position that drug screening constitutes a mandatory subject of bargaining under the NLRA (J.A. at 127), Conrail is incorrect in asserting that the appellate court based its decision on that position or on NLRA principles. Rather, the appellate court carefully traced the distinction between major and minor disputes and properly recognized that the crucial criteria is whether a change, or a true contractual interpretation issue, is in dispute, and it saw the General Counsel's memorandum as confirming its independent conclusion that a change was at issue here.

A few additional words must be added in response to the Solicitor General's discussion of the NLRB General Counsel's memorandum. In asserting that the memorandum supports a finding that the court was without jurisdiction to enforce Sections 2 First, 2 Seventh and 6 of the Railway Labor Act because of the *Collyer* deferral doctrine (*Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971)),

the Solicitor fails to recognize the "central" role which the status quo obligation plays in the Railway Labor Act, but not under the NLRA's statutory scheme.

Moreover, the United States substantially distorts the *Collyer* doctrine itself by ignoring one of the principal limits on *Collyer* articulated by the NLRB. Put simply, the *Collyer* deferral doctrine does *not* apply where deferral *would deny to a charging party any access to injunctive relief from the courts that would otherwise be available as "just and proper,"* 29 U.S.C. § 160(j). *See AMF, Inc.*, 219 N.L.R.B. 903, 912 (1975); *see also* General Counsel's Memo, at 11-13; *cf.* NLRB General Counsel, *Report on Utilization of Section 10(j) Injunction Proceedings, January 1, 1980 through December 31, 1983* (April 23, 1984) at 13-14 (noting and citing cases of 29 U.S.C. § 160(j) injunctions where the employer "implement[ed] important changes in working conditions without bargaining with the union"). And the United States provides no explanation as to why an NLRA doctrine that has been carefully cabined to assure that a union protesting unilateral employer action is not denied equitable relief otherwise available under the NLRA, should be applied to the Railway Labor Act in a way that denies unions access to a statute's otherwise available equitable relief against such unilateral action.

While the best course is to deem the *Collyer* doctrine irrelevant here (*Chicago & North Western Ry. v. UTU, supra*, 402 U.S. at 579 n.11), if any use of *Collyer* is appropriate, it is that even under the NLRA—a statute that relies to a far lesser extent on equitable enforcement of status quo requirements—an employer cannot use deferral to arbitration as a means of escaping otherwise available equitable remedies.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the Judgment should be affirmed.

Respectfully submitted,

Of Counsel:
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

CORNELIUS C. O'BRIEN, JR.
O'BRIEN AND DAVIS, PC.
Suite 306
Centre Square West
1500 Market Street
Philadelphia, PA 19102
(215) 568-4343

LAWRENCE M. MANN *
ALPER & MANN
Suite 811
400 First Street, N.W.
Washington, D.C. 20001
(202) 298-9191

WILLIAM G. MAHONEY
JOHN O'B. CLARKE, JR.
HIGHSAW & MAHONEY, P.C.
Suite 210
1050 17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500
Attorneys for Respondents
* Counsel of Record

Date: January 17, 1989

APPENDIX A

Railway Labor Executives' Association
Member Organizations

American Railway & Airway Supervisors Association (Division of TCU);

American Train Dispatchers' Association;

Brotherhood of Locomotive Engineers;

Brotherhood of Maintenance of Way Employes;

Brotherhood of Railroad Signalmen;

Brotherhood of Railway Carmen (Division of TCU);

Hotel Employees and Restaurant Employees International Union;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;

International Brotherhood of Electrical Workers;

International Brotherhood of Firemen & Oilers;

International Longshoremen's Association;

National Marine Engineers' Beneficial Association;

Railroad Yardmasters of America (Division of UTU);

Seafarers International Union of North America;

Sheet Metal Workers' International Association;

Transport Workers Union of America;

Transportation•Communications International Union (TCU); and

United Transportation Union.

No. 88-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR PETITIONER

HARRY A. RISSETTO
1800 M Street, N.W.
Washington, DC 20036

Of Counsel:
MORGAN, LEWIS & BOCKIUS

DENNIS J. MORIKAWA *
MICHAEL J. OSSIP
SARAH A. KELLY
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5513

BRUCE B. WILSON
JEFFREY H. BURTON
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103

Attorneys for Petitioner Consolidated Rail Corporation

* Counsel of Record

February 16, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

RULES

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR PETITIONER

ARGUMENT

Consolidated Rail Corporation ("Conrail") seeks reversal of the decision of the court below on the ground that the court misapplied the "arguably justified" standard that all the circuit courts of appeals have adopted in determining the existence of a major or minor dispute under the Railway Labor Act, 45 U.S.C. §§ 151-88 (1982) ("RLA"). Rather than address the issue of whether Conrail's position that it had the right to add a drug test to the urinalysis component of its existing fitness for duty physical examinations was at least "arguable," Respondent Railway Labor Executives' Association ("RLEA" or the "Unions") has devoted most of its Brief to challenging this uniformly adopted standard. RLEA has done so despite conceding that it did not raise such a challenge in the courts below.

Conrail submits that RLEA's newly-proposed standard is contrary to the purposes of the RLA, as it would impermissibly place the federal courts in the role of prejudging many of the thousands of railway labor disputes which arise each year—a function that this Court and the lower courts have consistently held is reserved for arbitration. In contrast to RLEA's proposed standard, the "arguable" standard fosters the RLA's goal of preventing interruptions to commerce while providing an effective and efficient means for resolving disputes between rail unions and carriers.

I. RLEA SHOULD NOT BE PERMITTED TO INTRODUCE AN ENTIRELY NEW ISSUE THAT IT NEVER RAISED IN THE PROCEEDINGS BELOW OR IDENTIFIED IN ITS FORMULATION OF THE QUESTION PRESENTED.

Throughout this litigation, and indeed until the filing of RLEA's Brief, this action has involved the single question of whether Conrail's contention that it had the right to add a drug screen to the urinalysis component of its existing physical examinations raised a "minor" dispute under the RLA. There has never been any disagreement between the parties that the "arguable" standard is to be used in differentiating between "major" and "minor" disputes. In fact, RLEA candidly admits "Respondents did not challenge below the proper standard to be applied in determining whether the underlying controversy is a major or a minor dispute." (Brief for Respondents at 35 n.29).

Moreover, as recently as last July, in its Brief in Opposition to Conrail's Petition for Certiorari, RLEA advised this Court that "this litigation does not involve any novel points of law that the Court has not already addressed." In addition, RLEA urged that the "legal standards to be followed are well known and the Third

Circuit Opinion correctly discusses such legal standards." (Brief for Respondents in Opposition at 6.)[1]

In its Brief for Respondents, RLEA now seeks to challenge the very standard which it previously supported. RLEA contends for the first time that the "arguable" standard, which has been consistently applied by federal courts for 30 years, is an erroneous test for differentiating major and minor disputes under the RLA. RLEA argues instead that its independent review of the legislative history of the RLA suggests that a different standard should be applied which makes all changes by the carrier presumptively "major" disputes unless the carrier initially can demonstrate to a federal court the existence of a "clear and patent contractual right" authorizing the change. (Brief for Respondents at 36). RLEA now submits that rejection of the long-established standard and adoption of its proposed standard will better serve the objectives of the RLA.[2] RLEA takes this position notwithstanding its recent acknowledgement that the "arguable" or "not obviously insubstantial" test for determining minor disputes has been settled law for at least "the past four decades."[3]

---

[1] The Third Circuit's articulation of the standard to be applied in determining minor disputes which RLEA supported was:

> [i]f the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial', the controversy is [a minor dispute] within the exclusive province of the National Railroad Adjustment Board.

(JA-120).

[2] RLEA has presented similar arguments in its Petition for Writ of Certiorari in *Railway Labor Executives' Ass'n v. Chicago & N. W. Transp. Co.*, No. 88-464, *cert. denied*, 109 S. Ct. 493 (1988).

[3] *Id.* at 19. RLEA does not appear to be contending that there exists any conflict among the circuits with respect to the proper standard to be applied by the courts in determining the existence of

RLEA should not be permitted to raise at this juncture new issues which were never argued below or even identified in RLEA's formulation of the question presented in its Brief in Opposition to the Petition for Certiorari. Supreme Court Rule 21.1(a) states that the Court will only consider the questions presented in the Petition. Rule 34.1(a) requires that briefs on the merits "may not raise additional questions or change the substance of the questions already presented" in the Petition for Certiorari. Rule 34.2 further provides that "[t]he brief filed by an appellee or respondent shall conform to the foregoing requirements." This Court has frequently stated that it will not entertain new questions or issues raised for the first time in briefs on the merits but not in the questions presented. *Dorszynski v. U.S.*, 418 U.S. 424, 431-32 n.7 (1974); *Radio Officers' Union v. NLRB*, 347 U.S. 17 n.35 (1954); *cf. Stone v. Powell*, 428 U.S. 465, 482 n.15 (1976), citing *Kaufman v. U.S.*, 394 U.S. 217, 239 n.7 (1969) (". . . only in the most exceptional cases will we consider issues not raised in the petition.").

The Court similarly restricts respondents to issues that they have raised below. *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983) (respondent did not raise an issue of unethical conduct in district court or the court of appeals and the court declined to address it); *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980) ("ordinarily we will not consider a claim that was not presented to the courts below."); *Hankerson v. North Carolina*, 432 U.S. 233, 240 n.6 (1977) ("respondent may make any argument *presented below* that supports the judgment of the lower court.") (emphasis added).[4]

---

major and minor disputes under the RLA. Rather, RLEA apparently suggests that the "arguable" standard was improperly utilized by all of the circuit courts of appeals. Presumably, in RLEA's view, those decisions are erroneous as a matter of law.

[4] Although the Court in its discretion has made exceptions to the rule stated above, none of the Court's recognized exceptions exists in this case. According to Rule 34.1(a), the Court may consider an issue not raised in the Petition if such consideration is necessary to rectify a plain error made by the courts below. However, the Court has limited "plain error review" only to those circumstances where it is necessary for the purpose of correcting "obvious instances of injustice or misapplied law." *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). In addition, the Court has exercised its discretion to rectify plain error upon review of federal court proceedings in exceptional circumstances where the error seriously affects the fairness, integrity or reputation of public proceedings. *Connor v. Finch*, 431 U.S. 407, 421 n.19 (1977); *Silber v. U.S.*, 370 U.S. 717, 718 (1962).

Having failed to challenge below the standard for determining major and minor disputes under the RLA, and in the absence of exceptional circumstances justifying discretionary review by this Court, consideration by the Court at this time of RLEA's proposed new standard would be unwarranted and would inject substantial confusion into a well-settled area of law.

II. RLEA'S NEWLY PROPOSED STANDARD WOULD EMBROIL THE FEDERAL COURTS IN INNUMERABLE RAIL AND AIRLINE LABOR DISPUTES AND WOULD REQUIRE THEM TO PREJUDGE ISSUES RESERVED FOR ARBITRATION.

RLEA proposes a new standard that "disputes over changes are presumptively major disputes unless the carrier can satisfy either of the two limited exceptions set forth in Section 2 Seventh of the Act." (Brief for Respondents at 12). According to RLEA, these exceptions occur (1) when the carrier has complied with the major dispute provisions found in Section 6 of the Act, 45 U.S.C. § 156; or (2) when a carrier can assert a contractual right to make the change which is "clear and patent." *Id.*

RLEA's "clear and patent" standard reflects a fundamental misconception of the limited role of the federal courts in resolving railway labor disputes and is contrary

to the underlying purposes of the RLA.[5] By contrast, the "arguable" standard, which has been adopted by all circuit courts of appeals,[6] effectuates the exclusive jurisdiction of Adjustment Boards to resolve disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. § 153 First (i). The exclusivity of the jurisdiction of the Adjustment Boards has been repeatedly endorsed by this Court in recognition of the RLA's statutory objective to provide an effective and efficient means of resolving railroad-employee disputes and "to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and *out of the courts.*" *Union Pacific R.R. v. Sheehan*, 439 U.S. 89, 94 (1978) (emphasis added).

Adherence to this principle ensures that disputes between employees and carriers will be entrusted to resolution by arbitrators knowledgeable in the practices of the industry and that interruptions to commerce through union self-help will be avoided. *Gunther v. San Diego & Arizona E. Ry.*, 382 U.S. 257, 261 (1965); *Slocum v. Delaware, Lackawanna & W. R.R.*, 339 U.S. 239, 242 (1950); *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 566-67 (1946).

---

[5] Conrail also strongly disagrees with RLEA's review of the legislative history of the Railway Labor Act. However, given the limitations of this Reply Brief, Conrail will not address the correctness of RLEA's historical analysis.

[6] Appendix C to the Brief for Respondents in Opposition to the petition for writ of *certiorari* in *Railway Labor Executives' Ass'n v. Chicago & N. W. Transp. Co.*, No. 88-464 at 24a, *cert. denied*, 109 S. Ct. 493 (1988), lists over 50 cases by 10 different circuits which over the last 30 years have consistently adopted the "arguable" or "not obviously insubstantial" standard.

RLEA's contention that employees are by statute accorded a perpetual and "fundamental right . . . to be consulted prior to the implementation of a decision by management adversely affecting wages or working conditions" cannot realistically be applied to every management decision. (Brief for Respondents at 13). To do so would create a concept of labor policy which is antithetical to the principle that ". . . somebody must be boss; somebody has to run the plant. People can't be wandering around at loose ends, each deciding what to do next. Management decides what the employee is to do. . . . To assure order, there is a clear procedural line drawn: the company directs and the union grieves when it objects . . . ." Goldberg, *Management's Reserved Rights: A Labor View*, in *Management Rights and the Arbitration Process—Proceedings of the Ninth Annual Meeting of the National Academy of Arbitrators*, 120-21 (J. McKelvey ed. 1956).

Application of a "clear and patent" standard would eviscerate the function of the Adjustment Boards and embroil the federal courts in innumerable rail labor disputes. This is because in every case where a carrier initiates a "clear change" in working conditions based upon a "disputed contractual right" justifying the change (Brief for Respondents at 34), the courts would be required to conduct preliminary injunction proceedings in which they would take evidence upon and interpret the parties' collective bargaining agreements and past practices[7] to determine whether the carrier had a "clear and patent" contractual right to take such action.[8]

---

[7] Similarly, in reviewing claims based on past practice, RLEA would require a federal court to initially review the practice in sufficient detail to determine if it was "unequivocal; tacitly or mutually agreed upon; clearly enunciated and acted upon; and long standing as a fixed and established practice accepted by both sides without objection or repudiation." (Brief for Respondents at 43).

[8] A similar argument has been rejected under the National Labor Relations Act. In *Buffalo Forge Co. v. United Steelworkers*, 428

Thus, many of the thousands of minor disputes that arise each year in the railroad and airline industries would be transformed into presumptive major disputes that would require resolution by federal courts.[9]

A "clear and patent" standard would also severely inhibit day-to-day operations of railroads and could esca-

U.S. 397 (1976), this Court held that courts should not become involved in making contractual determinations in the context of preliminary injunction hearings because to do so would usurp the fundamental role accorded to arbitrators. Further, even a "clear" contractual basis or justification would still not serve to justify judicial intrusion into the arbitration process. Justice White, speaking for the majority in *Buffalo Forge*, stated "[t]he dissent suggests that injunctions should be authorized in cases such as this at least where the violation, in the court's view, is clear and the court is sufficiently sure that the parties seeking the injunction will win before the arbitrator. But this would still involve hearings, findings, and judicial interpretations of collective-bargaining contracts. It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and it is difficult to believe that the arbitrator would not be heavily influenced or wholly pre-empted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted." 428 U.S. at 412.

Moreover, whether or not an alleged right or violation is "clear" does not change the essential character of the dispute. "The only difference between a 'clear' violation and a 'doubtful' one is that the former makes a clear grievance and the latter a doubtful one. But both must be handled in the regular prescribed manner." *Ford Motor Co.*, 3 Lab. Arb. (BNA) 779 (1944).

[9] In its Brief in Opposition to the Petition for Writ of Certiorari in *Railway Labor Executives' Ass'n v. Chicago & N. W. Transp. Co.*, No. 88-464 at 17 n.27, *cert. denied*, 109 S. Ct. 493 (1988), the respondent pointed out that more than 5,000 minor disputes arise each year in the railroad industry alone, citing Appendix to the Budget of the United States Government, FY 1989, at I-Z66 (1988) (6,610 new railroad arbitrations commenced in 1987); Appendix to the Budget of the United States Government, FY 1988, at I-Z64-65 (1987) (5,359 new railroad arbitrations commenced in 1986); Appendix to the Budget of the United States Government, FY 1987, at I-Z80 (1986) (8,414 new railroad arbitrations commenced in 1985).

late many common labor-management disagreements into potential work stoppages. Any actions which were not clearly and expressly part of the collective bargaining agreement would be treated as major disputes. The collective bargaining agreement, as a "generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate," *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960), *quoted in Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157, 161 (1966), would have to be replaced with an extremely detailed document specifying the precise rights of the parties. Railroads would be faced with a "virtually impossible" task of including all working conditions in a collective bargaining agreement in order to avoid its actions triggering a potentially crippling major dispute. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 154 (1969). Under RLEA's scheme, it would be impossible for the carrier to predict with a reasonable degree of certainty whether it may continue to rely upon a longstanding past practice for, according to RLEA, it "is up to the party being affected by the change, and not the courts, to decide whether, in its opinion the change is so 'drastic' or 'major' that it will exercise its statutory right to bargain over that proposed change." (Brief for Respondents at 47).[10]

[10] Under RLEA's theory, those "hybrid" disputes that should be resolved by the federal courts would involve every controversy where a carrier "relies either on a written agreement or, as is more typical today, on past practice to assert that the disputed change is in the manner prescribed by the agreement." (Brief for Respondents at 36-37). Therefore, RLEA suggests that the federal courts should not surrender their jurisdiction over the dispute to the Adjustment Boards unless the carrier has demonstrated a "clear and patent contractual right to make such a change." But quite the opposite is true under the Railway Labor Act for indeed this Court has held that where a carrier seeks to effectuate a change that "put[s] in issue the meaning of the contracts that allegedly em-

III. THE "ARGUABLE" STANDARD SERVES THE RLA'S STATUTORY PURPOSES BY CHANNELING DISPUTES AND PRESERVING THE EXCLUSIVE JURISDICTION OF THE ADJUSTMENT BOARD.

Not only is the standard proposed by RLEA inflexible and unrealistic, it is contrary to the primary goal of the RLA to provide mechanisms for resolving disputes and to avoid disruptions to railroad operations. "The *first* declared purpose of the Railway Labor Act is 'To avoid any interruption to commerce or to the operation of any carrier engaged therein.'" *Slocum v. Delaware, Lackawanna & W. R.R.*, 339 U.S. 239, 242 (1950), citing 45 U.S.C. § 151a (emphasis added). The Act itself, and the cases decided thereunder, provide that the statute's essential function is to channel disputes into resolution mechanisms which will prevent interruptions to commerce. *Elgin, Joliet & E. Ry. v. Burley*, 325 U.S. 711 (1945). The RLA contains "[t]he framework for fostering voluntary adjustments between the carriers and their employees in the interest of the efficient discharge by the carriers of their important functions with minimum disruption from labor strife. . . ." *International Ass'n of Machinists v. Street*, 367 U.S. 740, 755 (1961).

---

bodied the working conditions which [the carrier was] about to change," it was for the Adjustment Board and not the courts to interpret the contract. *Order of Ry. Conductors v. Pitney*, 326 U.S. 561, 565 (1946). This Court noted that Congress established the Adjustment Boards to interpret labor contracts and "it also intended to leave a minimum responsibility to the courts." 326 U.S. at 566.

Indeed, the vast majority of RLA disputes involving federal court litigation are triggered by some change undertaken by the carrier. For example, virtually every case referenced in footnote 6, *supra*, in which the courts have applied the "arguable" or "not obviously insubstantial" standard involved a change of some kind and the reliance by the carrier on either a contractual term or past practice to justify that change.

The determining factor in deciding whether a minor or major dispute exists is whether the claim is premised upon existing rights or whether one party is seeking to acquire new rights. Major disputes "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past," while in minor disputes "the claim is to rights accrued, not merely to have new ones created for the future." *Elgin, Joliet & E. Ry. v. Burley, supra*, 325 U.S. at 723. The collective bargaining agreement forms the "generalized code" governing the relationship. However, all of the parties' rights and all of the conditions of employment are certainly not expressly included within the four corners of that agreement. *Detroit & Toledo Shore Line R.R. v. United Transp. Union*, 396 U.S. 142, 155-56 (1969). Past practice or "course of dealing" is a well-accepted means of determining the scope of the parties' rights under a collective bargaining agreement. *Baker v. United Transp. Union*, 455 F.2d 149 (3d Cir. 1971); *United Transp. Union, Local Lodge No. 31 v. St. Paul Union Depot Co.*, 434 F.2d 220 (8th Cir. 1970), *cert. denied*, 401 U.S. 975 (1971); *Rutland Ry. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

RLEA's newly proposed standard would frustrate the declared purposes of the RLA and upset a long line of decisions which have determined that the courts' statutory task is to channel, but not decide, labor disputes. "At this advanced stage of the RLA's development,"[11] the Court should not adopt a radically new standard that would inject confusion into a workable and dynamic process that has fostered labor peace for over five decades.

---

[11] *Burlington N. R.R. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 453 (1987).

IV. RLEA HAS FAILED TO DEMONSTRATE WHY CONRAIL'S CONTENTION THAT IT HAD THE RIGHT TO ADD A DRUG TEST WAS NOT AT LEAST "ARGUABLY" BASED ON ITS PAST PRACTICES.

As an alternative to urging the Court to adopt a new "clear and patent" standard for differentiating between major and minor disputes, RLEA attempts to support the Third Circuit's decision by asserting that Conrail's position that it had the right to initiate drug testing was not even arguable. However, RLEA disregards the uncontradicted evidence concerning Conrail's past practice and relies upon an erroneous recitation of the record.

RLEA chooses to ignore the facts of record showing Conrail's unchallenged past practices of unilaterally establishing and changing medical standards, requiring employees to pass medical examinations and determining the medical tests to be included in the physical examinations. (JA 67-71). RLEA does not dispute that Conrail has always established and frequently changed its medical standards, and that Conrail has, in the past, required that employees take and pass physical examinations. Nor does it dispute that employees have been disqualified from service for not meeting Conrail's medical standards. While recognizing, as it must, these long-standing past practices, RLEA simply dismisses their relevance by arguing that the addition of drug testing was a "change." In fact, Conrail has undertaken numerous changes in its medical examinations in the past, without objection from RLEA. These changes demonstrate, at a minimum, Conrail's "arguable" right to add a drug test as part of its fitness for duty examination.[12]

---

[12] RLEA recognizes that both the Seventh and Eighth Circuits have upheld, on virtually identical facts, the carrier's "arguable" right to add a drug test. *Railway Labor Executives' Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700 (7th Cir. 1987); *Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N. R.R.*, 802 F.2d 1016 (8th Cir. 1986). Rather than attempt to distinguish those opinions, RLEA merely asserts that "the simple answer to Conrail's reliance on those cases is that those decisions were erroneous." (Brief for Respondents at 47).

The reasons advanced by RLEA in support of its contention that Conrail's position regarding the addition of the drug test was not even arguable are without merit and have no basis in the record. RLEA's argument is based upon two premises: (1) Conrail has improperly merged its fitness for duty standards with its disciplinary rules; and (2) Conrail is now attempting to "arbitrarily control off-duty, non-employment related conduct." (Brief for Respondents at 13). Neither premise is factually correct.

Contrary to the position taken by RLEA, the drug testing program implemented by Conrail is not a disciplinary device.[13] On the contrary, the program incorporates a counseling and rehabilitation service which enables employees to avail themselves of counseling and, if necessary, drug treatment. Employees are not discharged for testing positive for drugs during a physical examination but are required to submit a negative drug test within prescribed time periods under the supervision of the Medical Department. Moreover, employees found medically unfit for duty have always been subject to being removed from service without pay and have not been returned to duty until deemed fit to do so by the Medical Department. (JA-70).

RLEA also misrepresents the nature of Conrail's program when it charges that Conrail is now seeking to

---

[13] In a later decision, *Transport Workers' Union, Local 234 v. Southeastern Pennsylvania Transp. Authority*, Nos. 88-1160 and 88-1206, slip op. at 28 (3d Cir., Dec. 28, 1988) (to be reported at 863 F.2d 1110), the Third Circuit compounded its prior error by erroneously describing Conrail's drug policy as "mandating discharge of employees with positive drug test results regardless of a finding of impairment."

"regulat[e] the employee's private life." (Brief for Respondents at 44). That allegation ignores the fact that the way in which an employee conducts himself or herself while off duty (*e.g.*, eating, drinking, sleeping and other habits) may affect his or her ability to conform to the employer's fitness for duty standards. In that regard, there is no difference between Conrail's medical standards for detecting drug use and its other medical standards. RLEA has clearly acquiesced in Conrail's right to base its medical fitness for duty determinations on factors that could impact on an employee's private life.[14]

Moreover, with particular reference to drug use, RLEA has previously recognized that ". . . one who is using alcohol or drugs should not be working in the railroad system." [15] RLEA has further conceded that it is reasonable to believe that one who uses drugs off the job is more likely to use drugs on the job and that the use of drugs prior to reporting to work and while on duty are "an equal concern." [16] Thus, contrary to its own assertion, RLEA has recognized that off-duty drug use may have an impact on an employee's work performance.

In light of RLEA's recognition of the dangers of drug use and the possible connection between off-duty drug use and on-the-job drug use and in view of the impact that Conrail's other medical standards may have on an employee's private life, it is not at all implausible to con-

---

[14] In *Railway Labor Executives' Ass'n v. Norfolk & W. Ry.*, 833 F.2d 700, 706 (7th Cir. 1987), the court rejected a similar argument by RLEA that the drug testing was a "radical departure" in policy because, in contrast to other medical examinations, it allegedly "intruded into the employees' conduct of their private lives."

[15] Transcript of oral argument by Lawrence D. Mann, Esquire, on behalf of Railway Labor Executives' Association in *Burnley v. Railway Labor Executives' Ass'n*, No. 87-1555, *cert. granted*, 108 S. Ct. 2033 (1988), at 27.

[16] *Id.* at 31-33.

clude that Conrail's longstanding right to establish fitness for duty standards, to which the Unions clearly acquiesced, included the right to add a drug screen to the urinalysis component of its physical examinations. Indeed, RLEA's attempt to alter both the standard and the facts applicable to this case apparently reflects its tacit admission that Conrail's claim of justification for the addition of the drug screen was at least "arguable."

Respectfully submitted,

HARRY A. RISSETTO
1800 M Street, N.W.
Washington, DC 20036

Of Counsel:
MORGAN, LEWIS & BOCKIUS

DENNIS J. MORIKAWA *
MICHAEL J. OSSIP
SARAH A. KELLY
2000 One Logan Square
Philadelphia, PA 19103
(215) 963-5513

BRUCE B. WILSON
JEFFREY H. BURTON
CONSOLIDATED RAIL CORPORATION
1138 Six Penn Center Plaza
Philadelphia, PA 19103
Attorneys for Petitioner
Consolidated Rail Corporation

February 16, 1989

* Counsel of Record

No. 88-1 (7)

In the Supreme Court of the United States

OCTOBER TERM, 1988

CONSOLIDATED RAIL CORPORATION, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

CORRECTED COPY

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

LEONARD SCHAITMAN
JEFFREY CLAIR
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

31 pp

QUESTION PRESENTED

Whether a railroad's addition of a drug screen to the long-standing urinalysis component of its routine fitness-for-duty physical examinations gives rise to a "major" dispute under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, and is therefore not subject to arbitration by an adjustment board.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1

CONSOLIDATED RAIL CORPORATION, PETITIONER

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the question whether, under the Railway Labor Act, 45 U.S.C. 151 *et seq.*, a particular labor dispute must be resolved through collective bargaining, with the attendant possibility of a work stoppage, or whether, instead, it must be referred in the first instance to the grievance arbitration process, conducted by specially designed "adjustment boards." The United States has long sought to encourage the peaceful resolution of labor disputes likely to disrupt interstate transportation in the railroad and airline industries, both of which are cov-

ered by the Railroad Labor Act. Grievance arbitration affords labor and management an expeditious forum for resolving disputes over the interpretation and implementation of collective bargaining agreements. At the same time, it minimizes the risk that those disputes will result in work stoppages that may seriously disrupt the flow of interstate commerce. When there is a prospect of a seriously disruptive work stoppage, the United States also has a direct, programmatic interest, since the President may be called upon to create an emergency board to investigate and report on the underlying labor dispute. See 45 U.S.C. 160. More generally, the United States has an interest in clarifying the appropriate relationship between the railroad adjustment boards and the courts, and thus the proper scope of the arbitration process.

STATEMENT

A. The Statutory Framework

1. The Railway Labor Act, 45 U.S.C. 151 *et seq.*, is designed to ensure "the public continuity and efficiency of interstate transportation service, and to protect the public from injuries and losses consequent upon any impairment or interruption of interstate commerce * * *." H.R. Rep. 328, 69th Cong., 1st Sess. 1 (1926). In order "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 U.S.C. 151a), the Act imposes a duty on "all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise" (45 U.S.C. 152 First).

2. Where settlement between the parties cannot be achieved, however, the Act provides two distinct

procedures for resolving disputes. On the one hand, it provides for prolonged negotiation and mediation, followed if necessary by the availability of self-help. On the other hand, it establishes binding, compulsory arbitration. Whether one procedure or the other is available depends on the nature of the underlying dispute.

So-called "major" disputes involve "the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy." *Elgin, J. & E. R.R.* v. *Burley*, 325 U.S. 711, 723 (1945), aff'd on reh'g, 327 U.S. 661 (1946). Because major disputes "present the large issues about which strikes ordinarily arise" and "because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment" (325 U.S. at 723-724). Where such a dispute is involved, the parties must maintain the status quo while they engage in a lengthy process of negotiation, mediation, and possibly review by a Presidential Emergency Board. *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142 (1969). If that process fails to produce an agreement, however, each side is free to resort to strikes, lock-outs, or other forms of economic self-help calculated to achieve the desired objectives. See 45 U.S.C. 152 Second and Seventh, 155 First, 156, 157, 160; *Burlington N. R.R.* v. *Brotherhood of Maintenance of Way Employees*, No. 86-39 (Apr. 28, 1987), slip op. 14 n.10; *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

By contrast, "minor" disputes involve "the meaning or proper application" of a particular collective bargaining agreement, or they may relate to the so-called "omitted case," in which a dispute "is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement" (*Elgin*, 325 U.S. at 723). Like "major" disputes, "[m]inor disputes initially must be dealt with through a railroad's internal resolution processes." *Atchison T. & S. F. R.R.* v. *Buell*, No. 85-1140 (Mar. 24, 1987), slip op. 6. Unlike a major dispute, however, if a minor dispute is not settled through initial discussions, it may be "referred by petition of the parties or by either party" to one of a number of grievance "adjustment boards." 45 U.S.C. 153 First (i).[1] Submission of the grievance

---

[1] The statute authorizes the creation of several different types of adjustment boards. The National Railroad Adjustment Board ("NRAB") is a standing body created by Congress. 45 U.S.C. 153 First. It is divided into four divisions, each having jurisdiction over particular job classificatons. 45 U.S.C. 153 First (h). In addition, the parties, upon mutual agreement, may establish system, group, or regional boards of adjustment. 45 U.S.C. 153 Second. The creation of such boards is wholly voluntary, and either party to an agreement creating one of these boards may elect to come under the NRAB's jurisdiction upon ninety days notice (*ibid.*). Finally, the statute provides that any carrier or union may request the establishment of a special board of adjustment to resolve any dispute otherwise referable to the NRAB or any dispute that has been pending before the NRAB for twelve months. 45 U.S.C. 153 Second. These special boards, commonly known as "public law" boards, must be established upon demand. The parties are consequently required to join in an agreement establishing the board. If the parties fail to reach such an agreement, the National Mediation Board (see 45 U.S.C. 154, 155) can designate members of the board on a party's behalf. The board as designated must then determine all unresolved matters relating to its establishment and jurisdiction. 45 U.S.C. 153 Second.

to arbitration by an adjustment board is compulsory upon the request of either party; it does not depend on mutual agreement or consent. 45 U.S.C. 153 First (i), Second; see *Walker* v. *Southern R.R.*, 385 U.S. 196, 198 (1966). The boards, moreover, are structured so as to preclude deadlock and ensure a reasonably prompt decision. 45 U.S.C. 153 First (*l*), Second. And the decision of the adjustment board is final and binding upon the parties. 45 U.S.C. 153 First (m), Second. Thus, judicial review of an adjustment board decision is narrowly limited to whether the board exceeded its jurisdiction, failed to comply with specific statutory requirements of the Railway Labor Act, or was influenced by fraud or corruption. 45 U.S.C. 153 First (q), Second; *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 93 (1978) (per curiam).

B. The Present Controversy

1. Since its inception in 1976, petitioner, Consolidated Rail Corporation (Conrail), has required all of its employees to undergo periodic physical examinations. Conrail has also required train and engine employees who have been out of service for at least 30 days due to furlough, leave, suspension, or similar causes to undergo physical examinations upon returning to duty; in the case of all other employees, it has imposed the same return-to-service requirement if those employees have been furloughed, on leave, or suspended for at least 90 days. These physical examinations have included urinalysis for blood sugar and albumin, although they have not ordinar-

ily included a drug screen. Conrail has in the past required a drug screen only for employees who were taken out of service for drug-related conduct, or when, in the judgment of the examining physician, the employee may have been using drugs. Finally, Conrail employees have always been subject to "Rule G," an industry-wide rule that prohibits the use or possession of narcotics or intoxicants by employees who are on duty or who are subject to duty. Pet. App. A3-A4, A58-A59.[2]

On February 20, 1987, Conrail announced its decision to add a drug screen as part of the urinalysis in all periodic and return-to-duty physical examinations. The company explained that an employee who tested positive for drugs in such an examination would be barred from service unless, within 45 days, he could provide a negative drug test from a medical facility approved by Conrail's Medical Director. In addition, Conrail stated, an employee whose first test was positive would be given the opportunity to be evaluated by Conrail's Employee Counseling Service. If the evaluation revealed drug addiction, and the employee agreed to enter a treatment program, he would be given an additional period, up to 125 days, in which to provide a negative drug test. Pet. App. A5, A51.

2. Respondents thereafter filed suit in the United States District Court for the Eastern District of Pennsylvania, alleging that Conrail's action violated Section 6 of the Railway Labor Act, 45 U.S.C. 156,

[2] In 1984, Conrail announced that it would add a drug screen to the urinalysis conducted during its periodic, fitness-for-duty examinations. But that drug screen was implemented only in Conrail's Eastern Region and was discontinued after six months (Pet. App. A49).

and constituted an unreasonable search and seizure under the Fourth Amendment. It sought to enjoin Conrail from instituting the drug screen. Pet. App. A5.

The district court dismissed the complaint for want of subject matter jurisdiction (Pet. App. A23-A26), concluding, in pertinent part, that respondents' objection to the drug screen constituted a "minor" dispute and was therefore "subject to the mandatory and exclusive jurisdiction of the National Railroad Adjustment Board or a public law board" (*id.* at A23). The district court reasoned (*id.* at A24) that "[a] dispute is minor if the parties' agreement is reasonably susceptible of the contested interpretation or if the employer's action is arguably justified under the terms of the existing agreement." The court noted (*ibid.*) that Conrail had consistently included a urinalysis component in its periodic and return-to-work medical tests, and that under some circumstances the company had required a drug screen as well. The court therefore concluded that "Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy" (*ibid.*).[3]

3. The Third Circuit reversed (Pet. App. A1-A19), holding that Conrail's addition of a drug screen constituted a "major" dispute under the Railway Labor Act. The court recognized (*id.* at A9) that "[i]f the disputed action * * * can 'arguably'

[3] The district court also dismissed respondents' Fourth Amendment claim because they "failed to show for purposes of this motion that Conrail is a federal actor whose actions are subject to constitutional scrutiny" (Pet. App. A25). Respondents did not appeal from that determination, and the constitutional issue is not presented in this case.

be justified by the existing agreement or * * * if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial', the controversy is [a minor dispute] within the exclusive province of the National Railroad Adjustment Board." The court concluded, however, "that the agreement governing prior medical examinations cannot be strained to include, even arguably, an agreement to routinely perform a drug screen" (*id.* at A17). The court explained that the legislative history of the Act "makes clear * * * that 'minor' disputes, with their attendant compulsory arbitration, were to be limited to 'comparatively minor' problems" (*id.* at A8). A drug screen, the court observed, could not meet that standard, because "[e]mployee drug testing is a controversial issue throughout the railroad industry and beyond" and because "[t]he practice poses serious ethical and practical dilemmas" (*id.* at A16). The court acknowledged (*id.* at A9) that "it is not necessary that the terms of a collective bargaining agreement governing relations under the Act be embodied in a written document" and that the agreement might instead "be inferred from habit and custom." It nevertheless observed that Conrail could not "point to any existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed" (*id.* at A17). Finally, the court of appeals found it "particularly significant that the General Counsel of the National Labor Relations Board has taken the position that drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the National Labor Relations Act" (*id.* at A16-A17).

SUMMARY OF ARGUMENT

A. The courts of appeals—including, at least nominally, the court below—uniformly hold that a labor dispute is "minor," and therefore subject to arbitration under the Railway Labor Act, if the challenged action is "arguably justified" by the parties' contractual relationship. That standard comports with this Court's insistence that matters of contractual interpretation be left to the adjustment boards under the Act, and that such issues not be resolved by the courts. Moreover, a presumption of arbitrability is fully consistent with the parties' right to bargain collectively over "major" disputes, since if an adjustment board concludes that the dispute is a major one, it will issue an order to that effect and will remit the parties to negotiation and mediation under the statute.

B. Although the court of appeals articulated the correct legal standard, in applying that standard it relied on factors that are entirely at odds with the presumption of arbitrability. The court erred at the outset because it believed that "minor" disputes are limited to "comparatively minor problems." That is not so. The term "minor" is a term of art, and it refers to any dispute that is "arguably" governed by the agreement, regardless of how "important" the disputed issue is to one or both of the parties. The court next erred in requiring petitioner to show an express agreement about the details of its drug screening policy. That is wrong, because parties do not ordinarily spell out all the terms of their agreement in a formal contract, and because a dispute

may be "arguably" governed by the contract, even if the contract does not descend to elaborate detail. Finally, the court of appeals relied mistakenly on the NLRB General Counsel's memorandum concerning drug tests under the National Labor Relations Act. In particular, the court of appeals overlooked the fact that the Labor Board, like the courts under the RLA, will defer to the arbitration process in appropriate cases.

We believe that, under a correct application of the governing legal standard, the dispute over petitioner's addition of a drug screen is "arguably justified" by the contract and should be referred to an adjustment board. Although a board may ultimately agree with respondent that the terms of the contract do not resolve the dispute—and therefore remit the matter to the collective bargaining process—the Railway Labor Act requires that the board initially be given the opportunity to make that determination.

ARGUMENT

THE COURT OF APPEALS MISAPPREHENDED THE LEGAL PRINCIPLES FOR DETERMINING WHETHER A LABOR DISPUTE IS "MAJOR" OR "MINOR" UNDER THE RAILWAY LABOR ACT

A. A Labor Dispute Is "Minor" If It Concerns A Matter That Is "Arguably" Governed By The Contractual Relationship Between The Parties

1. The courts of appeals have uniformly held that a labor dispute is "minor" for purposes of the Railway Labor Act if it involves a matter that is "arguably" comprehended by the contractual relationship between the parties.[4] As the Eighth Circuit ex-

[4] See, *e.g.*, *International Ass'n of Machinists* v. *Soo Line R.R.*, 850 F.2d 368, 376 (8th Cir. 1988) (en banc); *Brotherhood of Ry. Clerks* v. *Atchison, T. & S. F. Ry.*, 847 F.2d 403, 406 (7th Cir. 1988); *Brotherhood of Locomotive Engineers* v. *Consolidated Rail Corp.*, 844 F.2d 1218, 1221 (6th Cir. 1988); *Baylis* v. *Marriott Corp.*, 843 F.2d 658, 663 (2d Cir. 1988); *International Brotherhood of Teamsters* v. *Southwest Airlines Co.*, 842 F.2d 794, 803 (5th Cir. 1988); *RLEA* v. *Boston & Maine Corp.*, 808 F.2d 150, 159 (1st Cir. 1986), cert. denied, No. 86-2054 (Oct. 5, 1987); *Switchmen's Union* v. *Southern Pac. Co.*, 398 F.2d 443, 447 (9th Cir. 1968).

plained in a recent case, "[t]his Court has said that a dispute is minor if the agreement is 'reasonably susceptible' of the interpretations sought by both the employer and the employees. Other courts have said that a dispute is minor if the employer's action can be arguably justified under the terms of the existing agreement * * *, or that the dispute is minor unless the employer's argument that its actions are within the contract is 'obviously insubstantial.' These locutions are essentially the same in their result." *Brotherhood of Maintenance of Way Employees, Lodge 16* v. *Burlington N. R.R.*, 802 F.2d 1016, 1022 (8th Cir. 1986) (citations omitted). The court below approved the same standard—at least nominally—when it stated (Pet. App. A9), "[i]f the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial,' the controversy is [a minor dispute] within the exclusive province if the National Railroad Adjustment Board."

The "arguably justified" standard "is not a stringent one in view of the substantial and long-standing interest in removing labor disputes from the federal courts and placing them in the expert hands of the various arbitration and mediation facilities." *O'Don-*

nell v. *Wien Air Alaska, Inc.*, 551 F.2d 1141, 1146-1147 (9th Cir. 1977). The rule reserves only a modest role for the courts. A court may not "interpret or construe the language of the contract"; its task is only to "determine whether th[e] case implicates a question of contract interpretation." *International Ass'n of Machinists & Aerospace Workers* v. *Northwest Airlines, Inc.*, 843 F.2d 1119, 1122 (8th Cir. 1988). Thus, "[i]f the question of whether a dispute is 'major' or 'minor' is close, it should be viewed as being 'minor' unless the carrier's contractual justification is 'obviously insubstantial' and the contract is not 'reasonably susceptible' to the carrier's interpretation." *Baylis* v. *Marriott Corp.*, 843 F.2d 658, 663 (2d Cir. 1988).[5]

2. Although this Court has more than once characterized particular labor disputes as "major" or "minor" (see, *e.g.*, *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U.S. 33, 36 & n.3 (1963)), it has not had occasion to decide the legal standard under which a given dispute may be found to be "minor," and therefore subject to arbitration by an adjustment board. The Court has, however, articulated several principles that, taken together, confirm that, to the fullest extent practicable, disputes concerning contractual interpretation should be resolved by the adjustment boards.

a. First, the Court has repeatedly emphasized that the adjustment boards have unusual expertise in the

[5] As the Seventh Circuit has noted, "[s]ince the machinery for resolving major disputes is conciliatory rather than binding, a major dispute can escalate into a strike, which in the transportation industries * * * can be a calamity. So it is no surprise that, when in doubt, the courts construe disputes as minor." *Brotherhood of Locomotive Engineers* v. *Atchison, T. & S.F. Ry.*, 768 F.2d 914, 920 (1985).

interpretation of collective bargaining agreements. "[T]he Board is acquainted with established procedures, customs and usages in the railway labor world. It is the specialized agency selected to adjust these controversies." *Elgin J. & E. R.R.* v. *Burley*, 327 U.S. 661, 664 (1946). As the Court has noted, "[t]he Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon.[6] Long and varied experiences have added to the Board's initial qualifications." *Slocum* v. *Delaware L. & W. R.R.*, 339 U.S. 239, 243 (1950) (footnote omitted).

b. Second and relatedly, the Court has held that the adjustment boards have exclusive jurisdiction over issues of contract interpretation, and that courts may not interfere with that jurisdiction. *Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320, 325 (1972); *Transportation Union* v. *Union Pac. R.R.*, 385 U.S. 157, 160, 164 (1966); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U.S. 33, 38 (1963); *Slocum*, 339 U.S. at 24. As the Court has explained, "[t]he Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and

[6] Soon after the National Railroad Adjustment Board was created, one commentator noted the kind of jargon that the adjustment boards might be called upon to construe. "The following bulletin was issued by a superintendent of the Southern Pacific Ry. in San Jose, Cal., on Dec. 20, 1928: 'All Yardmasters: Effective date, all yardmen in cannon-ball service bringing drags in yard from outside points will bleed and cut own cars'." Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L. J. 567, 569 n.10 (1937).

carriers regarding rates of pay, rules and working conditions." *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 94 (1978). For that reason, "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts" (*ibid.*). See also *Andrews* v. *Louisville & N. R.R.*, 406 U.S. 320 (1972) (rail employee may not maintain a wrongful discharge action in the courts but is limited instead to the grievance adjustment remedies established by the Railway Labor Act); *Union Pac. R.R.* v. *Price*, 360 U.S. 601 (1959) (once an aggrieved party has pressed a wrongful discharge claim before the adjustment board, he may not relitigate the same matter in a judicial action for damages); *Slocum* v. *Delaware, L. & W. R.R.*, 339 U.S. 239 (1950) (a dispute between two unions concerning the scope of their collective bargaining agreements was within the adjustment board's exclusive jurisdiction and could not be resolved by the state courts); *Order of Conductors* v. *Pitney*, 326 U.S. 561 (1946) (where a jurisdictional dispute between two unions turns on the meaning of an existing collective bargaining agreement, a federal court must stay its decision pending the adjustment board's interpretation of the agreement).

Because the adjustment board's jurisdiction over matters of interpretation is exclusive under the Act, the Court has also held that the parties may not resort to self-help measures to vindicate a claim arising from the interpretation of their contract. For example, in *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R.R.*, 353 U.S. 30 (1957), the Court held that rail labor unions may not strike over minor disputes pending before the National Railroad Adjustment Board and that, notwithstanding the Nor-

ris-LaGuardia Act, 29 U.S.C. 101 *et seq.*, a federal court may enjoin a union from striking over a minor dispute. The Court accordingly rejected the union's contention "that there is no compulsion on either side to allow the Board to settle a dispute if an alternative remedy, such as resort to economic duress, seems more desirable." 353 U.S. at 34. "Such an interpretation," the Court concluded, "would render meaningless those provisions in the Act which allow *one* side to submit a dispute to the Board, whose decision shall be final and binding on *both* sides." *Ibid.* (emphasis in original). See also *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas R.R.*, 363 U.S. 528, 534 (1960) (injunction against strike during minor dispute may be qualified by conditions against self-help by railroad, "at least where [the conditions] are designed not only to promote the interests of justice, but also to preserve the jurisdiction of the Board").

c. Finally, the Court has held that "[j]udicial review of these Boards' determinations * * * [is] '"among the narrowest known to the law."'" *Atchison T. & S. F. R.R.* v. *Buell*, No. 85-1140 (Mar. 24, 1987), slip op. 6 (citations omitted)). Under 45 U.S.C. 153 First (q), review of a board order "is limited to three specific grounds: (1) failure of the Adjustment Board to comply with the requirements of the Railway Labor Act; (2) failure of the Adjustment Board to conform, or confine, itself to matters within the scope of its jurisdiction; and (3) fraud or corruption." *Union Pac. R.R.* v. *Sheehan*, 439 U.S. 89, 93 (1978) (per curiam). The Court has therefore held that a court of appeals may not overturn a board decision simply because the decision may be characterized as one of law. See *ibid.* And

the Court has made clear that a party seeking to enforce its interpretation of a board decision may not engage in self-help, but is relegated instead to the concededly narrow process of judicial review. *Brotherhood of Locomotive Engineers* v. *Louisville & N. R.R.*, 373 U.S. 33 (1963).[7]

3. These principles all point to a legal standard that treats a dispute as "minor", and therefore subject to arbitration, whenever the employer's action is "arguably justified" by the agreement. As the Eighth Circuit has noted, the "arguably justified" standard "is a necessary adjunct of the need to protect the arbitrator's exclusive jurisdiction over minor disputes." *International Ass'n of Machinists & Aerospace Workers* v. *Northwest Airlines, Inc.*, 843 F.2d 1119, 1123, vacated as moot, 854 F.2d 1089 (8th Cir. 1988). On the one hand, it ensures that the broadest range of contractual issues will be deferred to the adjustment boards, thereby allowing them to discharge their statutory obligation to resolve all "disputes * * * growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." 45 U.S.C. 153 First (i). On the other hand, the "arguably justified" standard accords with Congress' in-

[7] Indeed, as one court of appeals has noted, "[p]erhaps 'review' is a misnomer. The district court (and this court, on appeal from the district court) does not review the correctness of the arbitration award, even under a highly deferential standard, such as 'clearly erroneous' or 'clear abuse of discretion.' All it asks, unless issues of fraud or corruption are raised, * * * is whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it." *Brotherhood of Locomotive Engineers* v. *Atchison T. & S.F. Ry.*, 768 F.2d 914, 921 (7th Cir. 1985).

tention that under the Railway Labor Act it is "essential to keep these so-called 'minor' disputes * * * out of the courts." *Union Pac. R.R.* v. *Sheehan*, 439 U.S. at 94. The court's function therefore ends once it is satisfied that there is a non-frivolous basis in the contract for the disputed action.

4. We note, finally, that a presumption in favor of arbitral jurisdiction does not jeopardize the parties' statutory right to demand collective bargaining over matters that involve a "major" dispute. When a court concludes that a dispute is "minor," it is *not* determining "the more searching question of which party's view of the existing agreement is correct." *Division No. 1, Detroit, Brotherhood of Locomotive Engineers* v. *Consolidated Rail Corp.*, 844 F.2d 1218, 1221 (6th Cir. 1988). Accord *RLEA* v. *Norfolk & W. Ry.*, 833 F.2d 700, 707 (7th Cir. 1987), cert. denied, No. 86-2054 (Oct. 5, 1987). Rather, it is determining only that the contractual arguments are sufficiently plausible to warrant committing the question to the adjustment board for initial determination. Once the dispute is referred to an adjustment board by one of the parties, the board is free to decide the merits of the controversy, and it may well conclude that the contract does not, in fact, sanction the challenged conduct. In that event, the adjustment board will fashion an appropriate order, and the party seeking to depart from the contract—as that contract has been construed by the adjustment board—is remitted to the process of "negotiation, mediation, voluntary arbitration, and conciliation" (*Detroit & Toledo Shore Line R.R.* v. *Transportation Union*, 396 U.S. at 148-149), followed by the availability of self-help. The parties' right to negotiate changes in pay or working conditions

through collective bargaining is therefore protected, but it is protected in a manner that does not require inappropriate judicial intrusion into the adjustment board's jurisdiction over questions of contract interpretation.

B. The Court of Appeals Misapplied The Principles for Determining Whether an Action is "Arguably" Justified by the Collective Bargaining Agreement

The court of appeals articulated the correct legal standard in resolving the dispute over Conrail's proposed drug screen. But the court misapplied that standard, relying on factors that are wholly at odds with the presumption of arbitrability.

1. The court of appeals got off on the wrong track at the outset, when it took as its premise that "minor" disputes are "limited to 'comparatively minor' problems" (Pet. App. A8). Apparently for that reason, the court found it significant that "[e]mployee drug testing is a controversial issue throughout the railroad industry and beyond" and that "[t]he practice poses serious ethical and practical dilemmas" (*id.* at A16).

As the Fifth Circuit has explained, however, "the method for determining whether a dispute is major or minor has absolutely nothing to do with how important a dispute is. The sole question is whether the proposed change has a basis in the contract." *International Brotherhood of Teamsters* v. *Southwest Airlines Co.*, 842 F.2d 794, 803 (5th Cir. 1988). "There is no necessary connection between the magnitude of the impact of a practice and its inclusion in (or exclusion from) a collective bargaining agreement." *National Ry. Labor Conf.* v. *International Ass'n of Machinists & Aerospace Workers*, 830 F.2d

741, 747 n.5 (7th Cir. 1987). In that respect, the term "minor" is something of a misnomer, since it refers not to the "impact of the dispute on the practices of the parties" but only to "whether or not there is a nonfrivolous argument that reference to a collective bargaining agreement will resolve the dispute" (*ibid.*).[8]

2. The court of appeals also erred in requiring petitioner to "point to an[] existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming results, and the confidentiality protections to be employed" (Pet. App. A17). There are two possible objections to that requirement, depending on what the court of appeals meant by its remarks.

First, the court may have meant that a dispute is minor only if it is governed by the *explicit* terms of the bargaining agreement. If so, the court was surely mistaken. It is uniformly recognized that "[i]n determining whether a proposal is 'arguably justified' by the contract [courts] must look both to the contract itself and to the practices under the contract." *International Brotherhood of Teamsters* v. *Southwest Airlines Co.*, 842 F.2d 794, 804 (5th Cir. 1988). Accord *Brotherhood of Ry. Clerks* v. *Atchison, T. & S.F. Ry.*, 847 F.2d 403, 406 (7th Cir. 1988); *RLEA* v.

---

[8] The court of appeals mistakenly relied (Pet. App. A8) on this Court's *Elgin* decision for the proposition that "minor" disputes refer only to "comparatively minor" issues. This Court used the phrase "comparatively minor" as a way of stating that "minor" disputes do not ordinarily give rise to work stoppages. 325 U.S. at 723-724. And while there is language in the opinion suggesting that "major" disputes involve "large issues" (*id.* at 723), it is clear that there, too, the Court was differentiating "major" disputes on the ground that they more often result in strike actions.

Norfolk & W. Ry., 833 F.2d 700, 705 (7th Cir. 1987), cert. denied, No. 86-2054 (Oct. 5, 1987); *Brotherhood of Maintenance of Way Employees, Lodge 16* v. *Burlington N. R. R.*, 802 F.2d 1016, 1022 (8th Cir. 1986). In the present case, not only the formal agreement with respondents, but also the historical understandings and practices that have evolved in implementing the agreement, are relevant in deciding whether the addition of a drug screen to the long-standing urinalysis test is "arguably justified."

Alternatively, the court of appeals may have meant that, although a court may look to the entire contractual relationship, it should defer to the arbitration process only if the parties' agreement and associated understandings address the disputed issue in considerable detail. Thus, because the contractual relationship between Conrail and its employees did not resolve such "crucial matters" as testing methods and privacy protections, the court could not find even an "arguable" justification in the contract. As this Court has explained, however, "[i]t would be virtually impossible to include all working conditions in a collective-bargaining agreement." *Detroit & Toledo Shore Line R.R.* v. *United Transportation Union*, 396 U.S. 142, 154-155 (1969). The same holds true even if one examines the entire contractual relationship, written and unwritten: the parties ordinarily will not have considered and expressly agreed on every detail of a particular issue. Nevertheless, the question whether the agreement between the parties "arguably" governs a particular dispute does not require, or permit, a *court* to delve that far into the minutiae of the contractual relationship. If the issue in dispute is generally (even if not specifically) within the ambit of the relationship, that should be sufficient to refer the matter to an adjustment board.

3. The court of appeals also found "particularly significant" an opinion of the NLRB General Counsel that "drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the National Labor Relations Act" (Pet. App. A16-A17). The court's reliance is misplaced for two reasons.[9]

First, as this Court has more than once explained, "the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, and with due regard for the many differences between the statutory schemes." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). Accord *Communications Workers* v. *Beck*, No. 86-637 (June 29, 1988), slip op. 5, 8; *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 686-687 n.23 (1981); *Chicago & N.W. R.R.* v. *Transportation Union*, 402 U.S. 570, 579 n.11 (1971). An-

[9] The General Counsel's memorandum is a set of guidelines that the General Counsel, in the exercise of her prosecutorial authority under Section 3(d) of the National Labor Relations Act (NLRA), 29 U.S.C. 153(d), has formulated "to assist the Regional Offices in the disposition of pending and future cases involving drug testing" (*NLRB General Counsel's Memorandum on Drug and Alcohol Testing*, Memorandum GC 87-5, at D-1 (Sept. 8, 1987)). Cf. *NLRB* v. *United Food & Commercial Workers Union*, No. 86-594 (Dec. 14, 1987), slip op. 17 (distinguishing between "prosecutorial" determinations of the General Counsel and "adjudicatory" decisions of the Labor Board). The General Counsel's position concerning drug testing has been upheld by NLRB administrative law judges in several cases (see, *e.g.*, *Star Tribune, a Division of Cowles Media Co.*, Nos. 18-CA-9938, 18-CA-10296 & J-D 266-88 (Nov. 3, 1988)), but the matter has not yet been adjudicated by the Board.

alogy to the NLRA is inappropriate in this case, because there is no system under the NLRA that is comparable to compulsory arbitration under the Railway Labor Act. To be sure, the NLRA provides that "[f]inal adjustment by a method agreed upon by the parties is * * * the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. 173(d). But unlike the Railway Labor Act, the NLRA does not mandate arbitration of grievances, nor does it establish special adjustment boards with expertise in labor contracts and exclusive jurisdiction over questions of interpretation.

In any event, the court of appeals overlooked a relevant part of the General Counsel's memorandum. Under the NLRA, a particular matter may be a mandatory subject of bargaining, but at the same time may be subject to arbitration under the collective bargaining agreement. As the General Counsel explained elsewhere in the memorandum, "if a dispute arguably raises issues of contract interpretation cognizable under the grievance provision of the parties' collective-bargaining agreement and subject to binding arbitration, it may be appropriate to defer the case" (*NLRB General Counsel's Memorandum on Drug and Alcohol Testing*, Memorandum GC 87-5, at D-3 (Sept. 8, 1987).

Indeed, deferral to the arbitration process is consistent with the Labor Board's long-standing, discretionary policy of refraining from adjudicating unfair labor practice allegations in circumstances where the dispute is more appropriately resolved through the parties' voluntarily-adopted arbitration procedures. For example, in *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971), the Board dismissed a

complaint alleging that an employer had unilaterally implemented changes in wages and working conditions. The Board explained (*id.* at 839) that "disputes such as these can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute." The Board concluded (*id.* at 841-842 (citation omitted)) that "'where, as here, the contract clearly provides for grievance and arbitration machinery, where the unilateral action taken is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege, and it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act, then the Board should defer to the arbitration clause conceived by the parties."

More recently, the Board applied the same principles, deferring to the arbitration process in a case in which an employer was alleged to have violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by threatening an employee with unlawful disciplinary action. *United Technologies Corp.*, 268 N.L.R.B. 557 (1984). The Board explained (*id.* at 558) that "[a]rbitration as a means of resolving labor disputes has gained widespread acceptance over the years and now occupies a respected and firmly established place in Federal labor policy." The Board observed, moreover, that "[t]he reason for [the] success" of arbitration "is the underlying conviction that the parties to a collective-bargaining agreement are in the best position

to resolve, with the help of a neutral third party if necessary, disputes concerning the correct interpretation of their contract (*ibid.*).[10]

Thus, even where an issue is a mandatory subject of bargaining, the Labor Board may elect to defer to the arbitration process so that an arbitrator may resolve relevant disputes about the meaning of the underlying contact. Indeed, the General Counsel made that very point, in a portion of her memorandum overlooked by the court of appeals (Memorandum, *supra*, at D-3). By ignoring the Labor Board's practice of deferring to arbitration, the court of appeals drew the wrong lessons from the NLRA—assuming that NLRA principles are applicable in the first place.

4. Under a correct application of the "arguably justified" standard, we believe that petitioner's addition of a drug screen constitutes a "minor" dispute. In light of Conrail's long history of routine urinalysis testing, the established fitness for duty requirements, and petitioner's established rule prohibiting the use or possession of drugs by on-duty employees, there is more than sufficient basis to require respondents to press their contentions through the adjustment board process. The board may ultimately agree with respondents' position, but the Railway Labor Act requires that the board be given the opportunity to make that determination.

---

[10] This Court has noted that the Labor Board's practice of deferring to the arbitration process is consistent with the intent of Congress. See *William E. Arnold Co.* v. *Carpenters District Council*, 417 U.S. 12, 16-17 (1974).

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JOHN R. BOLTON
Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

LAWRENCE S. ROBBINS
Assistant to the Solicitor General

LEONARD SCHAITMAN
JEFFREY CLAIR
Attorneys

NOVEMBER 1988

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 241699 60769

(6)

No. 88-1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

RICHARD T. CONWAY
(Counsel of Record)
RALPH J. MOORE, JR.
D. EUGENIA LANGAN

SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
Vice Chairman and
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

Attorneys for the National Railway Labor Conference

November 28, 1988

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.2.

STATEMENT OF THE CASE

From its inception in 1976, petitioner (hereinafter "Conrail") unilaterally has established, and at times modified, the medical or physical standards, tests and procedures applicable to its employees, without bargaining with the unions representing those employees. Employees are examined periodically and after returning to duty following a specified period of absence, to determine their fitness for duty. Conrail also has a policy (generally referred to as "Rule G"), unilaterally established and enforced without bargaining with the unions, pro-

hibiting the on-duty use or possession of intoxicants (including drugs) by employees and their use while subject to duty. See Pet. at A-48 through 60. In short, these policies and procedures have been left to managerial discretion, have not been the subject of collective bargaining under the Railway Labor Act ("RLA," 45 U.S.C. §§ 151 *et seq.*), and are not embodied in written agreements between Conrail and unions representing its employees.

Prior to 1987, urinalysis was routinely used to test for blood sugar and albumin and, if an employee previously had been taken out of service for a drug-related problem or in the judgment of the examining physician may have been using drugs, also for drugs. On February 20, 1987, Conrail announced that urinalysis would routinely be used for a drug screen in future physical examinations. Pet. at A-49 and 50. Shortly before, the increasing severity of the drug problem and the importance to railroad safety of preventing drug abuse by railroad employees unhappily had been emphasized by a January 4, 1987 collision of an Amtrak passenger train with Conrail locomotives, operated by a Conrail engineer while under the influence of marijuana, which killed 16 persons and injured 174 others. See Pet. at 2-3.

Nevertheless, respondents (hereinafter referred to as the "unions"), sued to enjoin this increased use of urinalysis to test for drug usage. Although they did not serve a notice under § 6 of the RLA of proposals in regard to that matter, they contended that Conrail had violated the *status quo* which the RLA requires be maintained while the procedures of the Act are being exhausted in a dispute over intended changes in collective agreements affecting rates of pay, rules, or working conditions; i.e., that Conrail's unilateral action in itself gave rise to a "major" dispute under the RLA. The District Court (E.D. Pa.) concluded, however, that the disputed drug testing is "arguably justified" as a "further refinement" of Conrail's practice, acquiesced in by the unions

since 1976, of unilaterally adopting "procedures to ensure an employee's fitness for the job"; and thus dismissed the complaint as involving an arbitrable "minor dispute" within the exclusive jurisdiction of an adjustment board to decide. Pet. at A-24 and 25.

The Third Circuit reversed. Pet. at A-1 through 19, reported as *Railway Labor Executives* v. *Consolidated Rail*, 845 F.2d 1187 (1988). It acknowledged that the controversy is a minor dispute if Conrail's disputed action "can 'arguably' be justified by the existing agreement" whether written or inferred from custom and practice. Pet. at A-9; 845 F.2d at 1190-1191. On substantially identical facts, moreover, two other circuits had held that the action of a carrier in adding a drug screen to the urinalysis aspect of its physical examinations was "arguably" justified so as to give rise to a minor dispute. *Railway Labor Executives* v. *Norfolk & Western Ry.*, 833 F.2d 700 (7th Cir. 1987); *Brotherhood of Maintenance* v. *Burlington Northern*, 802 F.2d 1016 (8th Cir. 1986). See Pet. at A-12 and 13; 845 F.2d at 1192-1193. In reaching a contrary conclusion as to Conrail, the Third Circuit sought to ascertain whether there was evidence of a "meeting of the parties' minds" encompassing the disputed drug testing both in general and in detail (Pet. at A-14 and 17; 845 F.2d at 1193 and 1194); concluded that there was no such evidence; and regarded it as "particularly significant" that the General Counsel of the National Labor Relations Board ("NLRB") has taken "the position that drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the" National Labor Relations Act ("NLRA"). Pet. at A-16 and 17; 845 F.2d at 1194.

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association which includes almost

all of the nation's Class I railroads, employing more than 90% of all railroad employees, among its members.[1] Those members include Amtrak, which provides intercity passenger service (for the most part over track maintained by other railroads and used also for freight operations), Conrail, and various other railroads that transport freight and, in some instances, also provide commuter passenger service. NRLC represents member railroads in multi-employer collective bargaining with unions representing their employees, and in regard to a variety of other labor relations matters of interest to the railroads generally. Among other things, it assists and advises member railroads in connection with the arbitration of minor disputes arising out of workplace grievances or the application and interpretation of collective bargaining agreements.

The issues in this case are of critical importance to the railroad industry. The practice under which a carrier unilaterally has established and modified fitness-for-duty standards applicable to its employees, and the tests and other procedures utilized in implementing those standards, generally has existed throughout the railroad industry. That also is true of Rule G and the means by which it has been enforced.[2] Thus, these matters traditionally have not been a subject of collective bargaining under the RLA or of written collective bargaining agreements.

In our view, this long-established practice implies that the unions have agreed that these policies, including re-

[1] CSX Transportation, a member of NRLC, does not support the arguments presented in this brief by the NRLC, except with respect to the issue concerning the inappropriateness of the Third Circuit's "meetings of the minds" test for determining the existence of a past practice.

[2] See the Brief for the National Railway Labor Conference as Amicus Curiae in Support of the Petition in *Burlington Northern Railroad Company* v. *Brotherhood of Locomotive Engineers*, No. 87-1631, at pp. 8-9, which petition is pending before the Court.

visions thereof, should be left to managerial discretion, and indicates that in any event they are managerial prerogatives which the Congress did not intend to make mandatorily bargainable under the RLA. But however that may be, there can be no doubt that this established practice has permitted the railroads to adapt their fitness requirements and means or methods of enforcement in the light of the seriousness of perceived threats to railroad safety and/or advances in medical technology, without previously invoking the long and drawn-out major dispute procedures of the RLA in an effort to reach agreements with each of the numerous unions representing railroad employees—which in any event could lead to strikes if no agreement is reached.

With rare if any exceptions, the unions did not challenge the right of a carrier to proceed unilaterally in regard to these matters until the carriers in recent years intensified their efforts to contain the threat to railroad safety from the use and abuse of intoxicants and extended the use of urinalysis to test for alcohol and drugs.[3] This has given rise to the conflict of appellate decisions referred to above in regard to the use of drug testing in physical examinations and referred to in the certiorari petition (and NRLC's *amicus* brief) in No. 88-1673 in regard to drug testing in enforcing Rule G.

There is no question about the importance of railroad safety or about the importance to railroad safety of maintaining a drug-free working environment.[4] The de-

[3] In *District Lodge 19* v. *Pacific Trans. Co.*, 105 L.R.R.M. 2046 (E.D. Cal. 1980), and in *Southern Pacific Transportation Co.* v. *Locomotive Engineers*, 96 Labor Cases ¶ 14,016 (N.D. Cal. 1980), two of the unions contested the right of the Southern Pacific unilaterally to adopt the use of an "intoxilyzer" breath analysis device to measure the concentration of alcohol in an employee's blood for purposes of enforcing Rule G. In both cases, the courts held that this gave rise to a minor dispute.

[4] The court below did "not minimize the serious drug and alcohol problems in the transportation industry," and noted that the unions

cision below, if upheld by this Court, would substantially interfere with the ability of the railroads to use advanced medical technology, including perhaps future improvements upon or beyond urinalysis, in fighting the threat to railroad safety from intoxicants including illegal drugs. The case also raises issues of general importance to the interpretation of the RLA. Thus, we urge this Court to reverse the decision below.

SUMMARY OF ARGUMENT

Under the RLA, disputes over changes in existing agreements respecting the "rates of pay, rules, or working conditions" of employees, including agreements implied from established practices, are called major disputes, while disputes over the application or interpretation of an existing agreement or established practice are called minor disputes. The parties to a major dispute are required to maintain the *status quo* while exhausting procedures that "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute," *Railway Clerks* v. *Florida E.C. R. Co.*, 384 U.S. 238, 246 (1966); but if no agreement is reached the parties may resort to self help, including strikes. Minor disputes not settled by agreement are subject to arbitration by an adjustment board, which has exclusive jurisdiction over such disputes, and strikes are unlawful at any time. If a union contends that a carrier's unilateral action changed an agreement or established practice in violation of the *status quo* provisions and the carrier contends that the action was permitted by the agreement or established practice, the courts of appeals consistently have held that the dispute is minor if the carrier's position is at least arguable.

"stated in their brief that they 'yield to no one in abhorence [sic] of alcohol or drug use in employment, or in the desire to purge the industry of their adverse effects.'" Pet. at A-18; 845 F.2d at 1195.

In holding that Conrail's expanded use of long-required urinalysis as a drug screen is not even arguably justified, the court below thought it must determine whether "it is plausible to believe that there was in fact a meeting of the parties' minds" that encompassed the disputed drug testing. That approach contravenes the teaching of this Court that a collective bargaining agreement is not "governed by the same old common-law concepts" applicable to other contracts, but rather "is a generalized code to govern a myriad of cases" not "wholly anticipate[d]," and thus "calls into being a new common law . . . of a particular industry or of a particular plant." *Transportation Union* v. *U.P. R. Co.*, 385 U.S. 157, 160-161 (1966). This Court repeatedly has emphasized the special competence of adjustment boards to determine the significance of custom and practice, as they include "representatives of management and labor" who are "in daily contact with workers and employers, and know[] the industry's language, customs, and practices." *Gunther* v. *San Diego A.E. R. Co.*, 382 U.S. 257, 261 (1965). As the Seventh and Eighth Circuits held as to other carriers in similar circumstances, Conrail's disputed drug testing is at least arguably justified by its past practice of determining unilaterally fitness-for-duty standards, tests and procedures.

Given the well established law under the RLA in regard to these matters and the differences in the statutory schemes, the particular significance which the court below attributed to the views of NLRB's General Counsel as to the application of the NLRA to drug testing is wholly unwarranted. In any event, while arbitration under the NLRA is voluntary, the courts require arbitration of even frivolous claims if covered by an arbitration agreement, and construe arbitration agreements to favor coverage in a manner similar to the "arguable" standard applied under the RLA in distinguishing minor from major disputes.

If the court below correctly held that there must be, and has not been, a plausible showing of a "meeting of the minds" on the disputed drug testing to give rise to a minor dispute, then that is a matter as to which there is no express or implied collective agreement. Under § 2 Seventh of the RLA as construed by this Court, a carrier may make changes in matters not "embodied in agreements" without invoking the major dispute procedures of the Act; and if, as here, the union did not invoke such procedures by serving an appropriate notice under § 6 of the Act, such unilateral changes do not violate the *status quo*.

In any event, the major dispute procedures apply only to changes in the "rates of pay, rules, or working conditions" of employees; *i.e.*, those are the only mandatory subjects of bargaining under the RLA. Drug testing at most is a method of enforcing a rule or working conditions, and is not itself a rate of pay, rule, or working condition. Hence, Conrail could require drug testing in enforcing its fitness-for-duty standards without proceeding under the major dispute provisions of the RLA even if they otherwise would be applicable.

ARGUMENT

I. The Statutory Framework under the Railway Labor Act.

The "major purpose of . . . the Railway Labor Act was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 565 (1930). The Act thus provides procedures for dealing with disputes over the representation of employees,[5] which are not involved here, and with what commonly are referred

[5] The National Mediation Board ("NMB") has jurisdiction to decide representation disputes. 45 U.S.C. § 152 Ninth. Where such a dispute is involved, strikes may be enjoined. *E.g.*, *Summit Airlines* v. *Teamsters Local Union No. 295*, 628 F.2d 787 (2d Cir. 1980).

to as "major" and "minor" disputes in accordance with terminology adopted in *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 722-728 (1945), on rehearing, 327 U.S. 661 (1946). Major disputes are "over the formation of collective agreements or efforts to secure them," and thus "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past." 325 U.S. at 723. The major dispute provisions of the RLA do not apply, therefore, if the issue is "whether an existing agreement controls the controversy." *Ibid.* Such issues are minor disputes "over the meaning or proper application" of an agreement "with reference to a specific situation or to an omitted case." *Ibid.* An "omitted case" involves "some incident of the employment relation, or asserted one, independent of those covered by the collective agreement . . . ." *Ibid.*

In regard to major disputes, Section 2 Seventh of the RLA prohibits a carrier from "chang[ing] the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act." 45 U.S.C. § 152 Seventh. Thus, "it operates to give legal and binding effect to collective agreements, and it lays down the requirement that collective agreements can be changed only by the statutory procedures." *Shore Line* v. *Transportation Union*, 396 U.S. 142, 156 (1969). That is true of implied agreements, such as those that arise from established practices, as well of express written agreements. *Id.* at 153-154, and 159 (Harlan, J., concurring in part and dissenting in part). However, as § 2 Seventh makes clear, a carrier need not resort to the "statutory procedure" in regard to changes in arrangements "made by the carrier for its own convenience and purpose" that have not been "embodied" in either an express or implied collective agreement. *Williams* v. *Terminal Co.*, 315 U.S. 386, 400, 403 (1942). Accord, *Order of Conductors* v. *Pitney*, 326 U.S. 561, 564-565 (1946).

Moreover, the major-dispute procedure expressly applies only to "intended change[s] in agreements affecting rates of pay, rules, or working conditions"; *i.e.*, only those subjects are mandatorily bargainable.[6] Section 6 requires both "[c]arriers and representatives of the employees" to serve the other with a written notice of such an "intended change," and, "where such notice of intended change has been given," prohibits alteration of the *status quo* as to the "rates of pay, rules, or working conditions" involved "until the controversy has been finally acted upon as required by" the Act. 45 U.S.C. § 156. In the absence of agreement, the parties to a major dispute must exhaust procedures that include conferences, mediation, and, at the discretion of the President, investigation and recommendations by an emergency board. See *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969). Those procedures "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Railway Clerks* v. *Florida E.C. R. Co.*, *supra*, 384 U.S. at 246. But if exhausted without a resolution of the dispute, the parties may resort to self help, including strikes of the carrier involved in the dispute. *Railroad Trainmen* v. *Terminal Co.*, *supra*, 394 U.S. at 378-379, 384.[7]

---

[6] The "duty to bargain imposed by the RLA extends only to those proposals directly related to 'rates of pay, rules, and working conditions.' . . . One of these issues must be implicated, and the action by management must affect people presently in the bargaining unit" represented by the union involved. *Intern. Broth. of Teamsters* v. *Southwest Airlines*, 842 F.2d 794, 800 (5th Cir. 1988). See, *e.g.*, *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330, 334, 339 (1960); *Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 347 (1944).

[7] In addition, this Court has held that the Norris-LaGuardia Act deprives the courts of jurisdiction to enjoin secondary picketing of other railroads. *Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employes*, 55 U.S.L.W. 4576 (1987).

Minor disputes, on the other hand, are decided by arbitration under § 3 of the RLA (45 U.S.C. § 153) if not settled by agreement of the parties. Disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions" (§ 3 First (i)) may be submitted to the National Railroad Adjustment Board ("NRAB") permanently established by § 3 First or to alternative adjustment boards created pursuant to § 3 Second. The Court repeatedly has held that the jurisdiction of these adjustment boards to arbitrate minor disputes is exclusive so that the courts have no jurisdiction to decide them.[8] A union cannot strike over such a dispute either before or after the decision of the adjustment board.[9] In short,

> "Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective-bargaining agreements. . . . The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. . . . *Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the courts.*"

Union Pacific R. Co. v. *Sheehan*, 439 U.S. 89, 94 (1978) (emphasis added; citations omitted).

Although the foregoing principles are well established by many decisions in addition to those cited, it often is

---

[8] *E.g.*, *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972); *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U.S. 239 (1950).

[9] *E.g.*, *Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957) (before); *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33 (1963) (after).

necessary for a court to decide conflicting contentions as to whether a particular dispute is minor or major in nature. "Confronted by such opposing characterization of particular disputes, the courts of appeals have consistently ruled that if the disputed action of one of the parties can 'arguably' be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not 'obviously insubstantial,' the controversy is within the exclusive province of" an adjustment board. *Local 1477 United Transportation Union* v. *Baker*, 482 F.2d 228, 230 (6th Cir. 1973).

That "arguably" standard for distinguishing between minor and major disputes has been adopted by every court of appeals that has considered the matter,[10] and has not been contested in this case. Any less rigorous standard would undermine the exclusive jurisdiction of adjustment boards to decide the merits of minor disputes and the intent of the Congress to keep them out of the courts.

II. This Dispute Is A Minor Dispute For an Adjustment Board to Decide.

Although the court below acknowledged the applicability of the "arguably" standard, it reached a decision clearly contrary to the spirit and purpose of that standard and of the RLA. That court proceeded as though its task were to apply the common law to decide the precise extent to which there was a "meeting of the minds" between Conrail and the unions. Even though previously Conrail determined and revised its fitness

[10] See the Brief for Respondents in Opposition to the petition for writ of certiorari in *Railway Labor Executives' Association* v. *Chicago and North Western Transportation Company*, No. 88-464, now pending before this Court. Appendix C to that brief lists some 50 cases, decided by 10 different circuits, in which the "arguably" standard has been adopted and applied.

standards, procedures and tests, without consultation with or objection from the unions; even though those tests included urinalysis which at times was used for a drug screen as well as for other purposes; and despite the importance to railroad safety of preventing the use and abuse of dangerous and illegal drugs by railroad employees; the court below concluded that Conrail had no "arguable" justification for using urinalysis as a drug screen in long-required routine physical examinations. This was clear error.

The court below stated that, to find a minor dispute, it must "determine[] that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue" (Pet. at A-14; 845 F.2d at 1193), and that it had "search[ed] the past practices of the parties in vain for any indication of an agreement" between them "on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed" (Pet. at A-17; 845 F.2d at 1194).[11] That "line of reasoning" is similar to the one this Court rejected in *Transportation Union* v. *U.P. R. Co.*, *supra*, 385 U.S. at 160-161, in regard to a union contention that "rests on the premise that collective bargaining agreements are to be governed by the same common-law principles which control private contracts between two private parties." As the Court there stated:

> "A collective bargaining agreement is not an ordinary contract for the purchase of good and services, nor is it governed by the same old common-law concepts which control such private contracts. . . .' * * * [I]t is a generalized code to govern a myriad of cases which the draftmen cannot wholly anticipate. * * * The collective agreement covers the whole em-

[11] The court did not point to problems in regard to those "crucial matters" that differ in nature from any that existed in Conrail's prior use of urinalysis to test for drug use in some physical examinations without objection from the unions.

ployment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant.'" (Citations omitted.)[12]

See also, *Gunther* v. *San Diego & A.E. R. Co.*, *supra*, 382 U.S. at 261-262.

Thus, if a carrier's practice has "occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions," an implied agreement thereto arises, and those "actual, objective working conditions and practices" are "broadly conceived . . . ." *Shore Line* v. *Transportation Union*, *supra*, 396 U.S. at 153, 154. As the court below once recognized, "when the railroad has engaged in a certain activity over a sufficient period of time for the union to become aware of it and react accordingly if it objects," the union's failure to object is enough to show acquiescence. *Baker* v. *United Transportation Union, AFL-CIO*, 455 F.2d 149, 156 (3d Cir. 1971). And, where that has been the past practice, as here, the implied "working condition" may be "an ongoing management prerogative that permits the railroad to change some aspect of its operations" unilaterally in the future as well. *Id.* at 154-155. This was the approach followed by the Seventh and Eighth Circuits in holding, upon substantially identical facts, that a dispute over a railroad's unilateral use of urinalysis as a drug screen in physical examinations is a minor dispute.[13] That

[12] Among others, the Court cited *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 550 (1960), in which it further concluded that a collective bargaining agreement under the NLRA "is not in any real sense the simple product of a consensual relationship."

[13] "For the past twenty years N & W has unilaterally determined what tests are administered as part of all employee medical examinations and the union has not previously objected to N & W's control over the content of these examinations." Hence, it is arguable that the "parties' past practice has been to accord N & W unilateral authority to determine the appropriate tests to conduct during

approach also should have been followed by the court below in this case and should be followed here.

Other interpretations also may be arguable, but the determination of which is correct is within the province of an adjustment board rather than the courts. That is particularly true in this case because there is no written agreement and interpretation turns altogether upon the implications to be drawn from custom and practice. The Congress in providing for arbitration of minor disputes "intended to leave a minimum of responsibility to the courts" for the very reason, among others, that the interpretation of collective agreements often requires consideration of "usage, practice and custom" which "must be taken into account and properly understood." *Order of Conductors* v. *Pitney*, *supra*, 326 U.S. at 566, 567. The NRAB was created as "[a]n agency especially competent" to deal with such issues. *Id.* at 567. "Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications." *Slocum* v. *Delaware, L. & W. R. Co.*, *supra*, 339 U.S. at 243. Its members include "representatives of management and labor . . . peculiarly familiar with the thorny problems and the whole range of grievances that constantly exist in the railroad world," as they are "in daily contact with work-

required medical examinations." *Railway Labor Executives* v. *Norfolk & Western Ry.*, *supra*, 833 F.2d at 706. "BN's past practice of requiring employees to submit to periodic and comprehensive medical examinations in order to ensure all employees are fit for duty is not challenged. . . . It is beyond dispute the drug screen is a new technique; the underlying purpose of the medical examinations, however, remains the same—to ensure all BN employees are fit for duty. The drug screen is nothing more than a method designed to detect the presence of a newly emerging threat to that fitness. . . . It should come as no surprise to the parties that the components of a work fitness physical examination will change with the times." Thus, BN's disputed "actions . . . are arguably justified" so that "this dispute should be submitted to the" NRAB. *Brotherhood of Maintenance* v. *Burlington Northern*, *supra*, 802 F.2d at 1024.

ers and employers, and know[] the industry's language, customs, and practices." *Gunther* v. *San Diego & A.E. R. Co.*, *supra*, 382 U.S. at 261.

The Court below thus usurped the jurisdiction of an adjustment board in circumstances where its special competence is most important—where decision turns altogether upon the implications to be drawn from custom and practice. That error was compounded by the particular significance attributed to a memorandum issued by the NLRB's General Counsel "to assist the Regional Offices in the disposition of . . . cases inovlving drug testing." Memorandum GC 87-5 as reprinted in Daily Labor Report No. 184 (BNA, September 24, 1987), at D-1. There is no "absence of viable guidelines" under the RLA for distinguishing between major and minor disputes, and thus between the respective jurisdictions of courts and arbitrators, so as to necessitate resort to analogies under the NLRA. See *Railroad Trainmen* v. *Terminal Co.*, *supra*, 394 U.S. at 391. But even if it were otherwise, the court below ignored the teaching that "analogies must be drawn circumspectly with due regard to the many differences between the statutory schemes." *Id.* at 383.

The General Counsel's memorandum is directed to the policies of her office in deciding whether to file unfair labor practice complaints and thus is concerned with her views as to the jurisdiction and policies of the NLRB with respect to such complaints—including, in a portion of her memorandum apparently overlooked by the court below—the NLRB's policies regarding deferral to arbitration.[14] There are fundamental differences between the

[14] Although the NLRB need not defer to arbitration, its general "policy is to refrain from exercising jurisdiction in respect to disputed conduct arguably both an unfair labor practice and a contract violation when . . . the parties have voluntarily established a binding settlement procedure." *William E. Arnold Co.* v. *Carpenters*, 417 U.S. 12, 16 (1974). The General Counsel discussed deferral to arbitration separately, at the end of her memorandum, and advised that the "Regions should apply the established Board criteria whether to defer cases" so that "if a dispute arguably raises issues of contract interpretation . . . subject to binding arbitration, it may be appropriate to defer the case." Daily Labor Report No. 184, *supra*, at D-3. Thus, assuming an applicable arbitration clause, the General Counsel (and the NLRB) might well defer to arbitration in circumstances such as exist here.

statutory schemes in those regards. Most importantly, there is no equivalent in the NLRA to the mandatory arbitration procedures in § 3 of the RLA, and there is no equivalent in the RLA to the NLRB or to the provision under which the NLRB's jurisdiction over unfair labor practice charges "shall not be affected by any other means of adjustment . . . established by law, agreement, or otherwise" (29 U.S.C. § 160(a)). Hence, the "relationship of the [NLRB] to the arbitration process is of a quite different order" than the relationship of a court to that process. *NLRB* v. *Acme Industrial Co.*, 385 U.S. 432, 436 (1967). The General Counsel in her memorandum is not concerned with the latter relationship, but the law under the NLRA in that regard provides the closest analogy for purposes of ascertaining the relationship of the courts to arbitration under the RLA.

Arbitration under the NLRA is voluntary, but if a collective agreement contains an arbitration clause, the courts compel arbitration of a covered dispute even if the position of one of the parties is believed to be frivolous. *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960). And, "unless it can be said with positive assurance that the arbitration clause is not susceptible to" such an interpretation, coverage is found "with doubts being resolved in favor of coverage." *Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 582-583 (1960). This "'presumption of arbitrability' announced in the *Steelworkers Trilogy* applies to safety disputes" as well as others. *Gateway Coal Co.* v. *Mineworkers*, 414 U.S. 368, 379 (1974). It goes at least as far as the "arguably" standard under the RLA in avoiding judicial encroach-

ment upon the jurisdiction of labor arbitrators. Indeed, like the "arguably" standard (see pp. 13-16 *supra*), the presumption of arbitrability flows in part from the fact that "the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it," *id.* at 378;[15] and, as the Court added, "the special expertise of the labor arbitrator, with his knowledge of the common law of the shop, is as important" in regard to "labor disputes touching the safety of employees as to other varieties of disagreement," *id.* at 379.

Plainly, therefore, when considered in the light of the differences between the statutory schemes, the law under the NLRA provides no support for the decision below denying arbitration in this case. But however that may be, it is well established under the RLA that a dispute such as this is minor and thus arbitrable by an adjustment board if the carrier's position is at least arguably justified by the collective agreement including custom and practice. Conrail's position surely is arguable, and we believe much stronger than that.

III. Even If the Collective Agreement Did Not Authorize Conrail's Disputed Action, It Did Not Restrict that Action and Conrail Could Act Without Invoking the Major Dispute Provisions of the Railway Labor Act.

As shown above, we believe that the court below erred in holding that the case does not give rise to a minor dispute because the court found no evidence of a "meeting of the minds" encompassing the disputed drug testing. But even if this Court should agree with the court below in that regard, there is no evidence of a "meeting of the minds" in which Conrail agreed *not* to revise its policies in regard to drug testing. Assuming a holding that there is no collective agreement that either authorizes or restricts Conrail's expanded drug testing, Conrail could unilaterally institute that drug testing without first

[15] Thus, "the labor arbitrator necessarily and appropriately has resort to considerations foreign to the courts. . . ." 414 U.S. at 378.

proceeding under § 6 and the other major disputes provisions of the Act or violating their *status quo* requirements.

As pointed out at p. 9 above, § 2 Seventh of the RLA expressly prohibits a carrier from "chang[ing] the rates of pay, rules, or working conditions of its employees, as a class *as embodied in agreements* except in the manner prescribed in such agreements or in Section 6 of the Act" (emphasis added); but there is no prohibition of such changes if the rates of pay, rules, or working conditions are not "embodied in agreements" either written or implied. And, this Court held in *Williams* v. *Terminal Co.*, *supra*, and in *Order of Conductors* v. *Pitney*, *supra*, that thus where there is no existing agreement the carrier may make unilateral changes without proceeding under § 6 and related provisions of the Act. See p. 9 *supra*.

In *Shore Line* v. *Transportation Union*, *supra*, the union had served a notice under § 6 of the RLA in regard to a matter, which was pending when the carrier effectuated the disputed action respecting that matter, and thus brought into play the *status quo* provisions in § 6 and related provisions of the RLA. See 396 U.S. at 144-145. The Court held that, when the union thus has "move[d] to bring . . . a previously uncovered condition within the agreement," the *status quo* includes working conditions in effect when the notice was served even if not embodied in an agreement. 396 U.S. at 155. *Williams* and *Pitney* were distinguished as involving the issue of whether § 6 and the *status quo* provisions applied, rather than the scope of those provisions when § 6 had been invoked so as to bring the *status quo* requirements into play. 396 U.S. at 157-158. But the Court did not overrule *Williams* and *Pitney*, and hardly could do so in view of the language of § 2 Seventh of the Act.

None of the unions served a § 6 notice proposing an agreement in regard to Conrail's fitness policies in general or drug testing in particular, before (or after) Con-

rail implemented its present drug testing policy. Hence, assuming a holding that Conrail's collective agreements neither authorized nor restricted the disputed drug testing, the major dispute provisions and their *status quo* requirements are not applicable and have not been violated by Conrail.[16]

IV. Drug Testing Is Not A Mandatory Subject of Bargaining Under the Railway Labor Act.

An alternative ground for reversing the decision below is that drug testing is neither a rate of pay, a rule nor a working condition, as those terms are used in the RLA, and thus is not an issue as to which § 6 and related major dispute provisions of the Act mandates collective bargaining. See n. 6 on p. 10 *supra* and accompanying text. Rather, drug testing is a means of assuring employee compliance with a fitness-for-duty standard, as here, and/or "Rule G" or some similar restriction on employee use of intoxicating alcohol and drugs (as in No. 87-1631), which are directed (among other things) towards providing safe and drug-free "working conditions."[17]

---

[16] See, also, *Intern. Ass'n of Machinists* v. *Trans World Airlines*, 839 F.2d 809, 812-815 (D.C. Cir. 1988), *cert. denied*, 57 U.S.L.W. 3204 (1988); *International Ass'n of M. & A. Wkrs.* v. *Reeve A.A. Inc.*, 469 F.2d 990, 993 (9th Cir. 1972), *cert. denied*, 411 U.S. 982 (1973); *Airline Flight Atten., Etc.* v. *Tex. Intern., Etc.*, 411 F. Supp. 954, 962-963 (S.D. Tex. 1976), aff'd mem., 566 F.2d 104 (5th Cir. 1978); *Atlanta & West Point R. Co.* v. *United Transportation Union*, 307 F. Supp. 1205, 1208 (N.D. Ga. 1970), aff'd, 439 F.2d 73 (5th Cir. 1971), *cert. denied*, 404 U.S. 825 (1971).

[17] While a charge therein is not involved in this case, we doubt if those standards and restrictions constitute a "rule" or "working condition" as to which the RLA mandates bargaining, at least insofar as they apply to the use or abuse of intoxicating alcohol and drugs. But see *Intern. Broth. of Teamsters* v. *Southwest Airlines*, *supra*, 842 F.2d at 799-801. Safety of operations is too critical to the successful operation of railroads and airlines, for those matters to have been left by the Congress to the constraints of collective bargaining. See *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 678-679 (1981) ("Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business"). We think it inconceivable that the Congress intended a carrier to bargain about a proposal that employees be allowed to operate a train or airplane while drunk or under the influence of illegal drugs, and be subject to strikes if it did not agree, yet that would be a possible consequence of a holding that employee restrictions in that regard are a mandatory subject of bargaining. This would "represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the . . . Act." *Textile Workers* v. *Darlington Co.*, 380 U.S. 263, 270 (1965). See *Local 346* v. *Labor Relations Com'n*, 391 Mass. 429, 462 N.E.2d 96, 102-103 (Sup. Jud. Ct. 1984). The fact that fitness-for-duty standards and Rule G traditionally have not been bargained about in the railroad industry reinforces the view that they are not mandatorily bargaining (see pp. 24-25 *infra*).

In *Rust Craft Broadcasting of New York, Inc.*, 225 N.L.R.B. 327 (1976), the NLRB rejected a contention that an employer violated the mandatory duty to bargain under § 8(a)(5) of the NLRA "by unilaterally initiating a more dependable method of enforcing its long-standing rule that employees record their time 'in and out.'" *Ibid.* Although this clearly constituted "a departure from the previous practice, more importantly the rule itself remained intact. And to those employees who had conscientiously followed this rule . . . , the new timeclock procedure would have been inconsequential." *Ibid.* More generally, "absent discrimination, an employer is free to choose more efficient and dependable methods for enforcing its workplace rules." *Ibid.*[18]

---

[18] See also, *e.g.*, *American Ambulance*, 255 N.L.R.B. 417, 422-423 (1981), enforced *per curiam* without opinion, 692 F.2d 762 (9th Cir. 1982); *Goren Printing*, 280 N.L.R.B. No. 64, 123 L.R.R.M. 1276 (1986); *Moody Chip Corp.*, 243 N.L.R.B. 265, 272 (1979); *Bureau of National Affairs, Inc.*, 235 N.L.R.B. 8, 9 (1978). In his influential concurring opinion in *Fibreboard Corp.* v. *Labor Board*, 379 U.S. 203, 223 (1964), Justice Stewart observed that in "many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are

This is all that has occurred here. Conrail has initiated a "more efficient and dependable" method (than visual observation) of enforcing its long-standing rule that employees be fit for duty as applied to drug usage. The use of urinalysis for that purpose as "to employees who had conscientiously followed" the rule would be "inconsequential," and that it even more true in this case since urinalysis has been and is required by Conrail even apart from its use as a drug screen.

Application of this approach is even more appropriate in construing the RLA since the most pertinent statutory language ("working conditions") is not as broad on its face as the otherwise similar term in the NLRA ("terms and conditions of employment").[19] Justice Stewart, concurring in *Fibreboard Corp.* v. *Labor Board*, *supra*, observed that "[i]n common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment" (379 U.S. at 222), but that the term is "susceptible of diverse interpretations" and had been more broadly construed by the NLRB and the courts in reviewing its decisions (*id.* at 221-222).[20] In rejecting a contention that "the term 'conditions of employment' has no broader meaning than that perhaps spontaneously suggested by the term

---

not 'with respect to . . . conditions of employment'" under the NLRA. *Rust Craft* did not refer to a prior decision, in *Medicenter, Mid-South Hospital*, 221 N.L.R.B. 670 (1975), in which the NLRB adopted the decision of an Administrative Law Judge ("ALJ") without issuing a separate opinion of its own. The ALJ dismissed a complaint based upon the unilateral use by the employer of polygraph testing for the purpose of identifying employees who had committed acts of vandalism in the course of a strike, as the union had had adequate opportunity to bargain about that matter; but in so doing asserted that the employer had a mandatory duty to bargain. In Memorandum GC 87-5, Daily Labor Report No. 184, *supra* at D-1, the General Counsel primarily relied upon *Medicenter* for her failure to "believe that drug testing falls within the realm of managerial or entrepreneurial prerogatives excluded from" the duty to bargain under the NLRA. She also stated that '[i]n addition, it is our view that a drug test is not simply a work rule—rather, it is a means of policing and enforcing compliance with a rule," and that there "is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is being broken" (*id.* at D-2), without noting that the Board in *Rust Craft* had relied upon that "critical distinction" in concluding that the unilateral institution of improved means for enforcing a rule is not mandatorily bargainable.

[19] Sections 8(a)(5) and (d) of the NLRA mandate bargaining with respect to " 'wages, hours, and other terms and conditions of employment,' " so that the "duty is limited to those subjects . . . ."

Labor Board v. *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). In *Broth. of Locomotive Eng.* v. *Burlington Northern*, 838 F.2d 1087, 1090 (1986), *cert. pending*, No. 87-1631, the Ninth Circuit rejected a contention that a carrier's use of drug testing in enforcing Rule G "is entirely a matter of management prerogative . . . not subject to collective bargaining," pursuant to an interpretation of the RLA as "requir[ing] parties to bargain over any proposal whose primary impact is the loss—or potential loss—of existing employment or employment-related benefits." 838 F.2d at 1090. That sweeping interpretation has no basis in precedent or in common sense. "Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of workers' jobs. Yet it is hardly conceivable that such decisions so involve 'conditions of employment' that they must be negotiated with the employees' bargaining representative." Stewart, J., concurring in *Fibreboard*, 379 U.S. at 223. Thus, "bargaining over management decisions that have a substantial impact on the continued availability of employment" is not necessarily required under the NLRA, *First National Maintenance*, *supra*, 452 U.S. at 679, and that plainly must be true also under the RLA.

[20] In the NLRA, "Congress assigned to the Board the primary task of construing" the provisions of the Act regarding the mandatory subjects of bargaining; thus, "if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495, 497 (1979). Congress has assigned the primary task of construing the RLA to the courts, rather than to an administrative agency, so that the courts can adopt the interpretation that they believe to be most justifiable even if some other interpretation is reasonably defensible.

'working conditions,' and that it therefore refers to the physical conditions under which employees are compelled to work rather than to the terms or conditions under which employment status is afforded or withdrawn," the NLRB noted that Senator Wagner (sponsor of the NLRA) had stated in debates on amendments thereto, "that the term 'condition of employment' as used in the original Act was intended to have a broader meaning than 'working conditions' . . . . (93 Congressional Record 3427)." *Inland Steel Company*, 77 N.L.R.B. 1, 7 (1948), enforced, 170 F.2d 247 (7th Cir. 1948), aff'd, 339 U.S. 382 (1950).[21]

Moreover, "the whole idea of what is bargainable has been greatly influenced by the practices and customs of the railroads and their employees themselves." *Telegraphers* v. *Chicago & N.W. R. Co.*, *supra*, 362 U.S. at 338.[22] Since neither fitness-for-duty requirements, Rule G, nor the tests and procedures utilized in enforcing compliance by a carrier with those requirements have heretofore been subjects of collective bargaining, on Conrail or in the railroad industry as a whole with rare if any exceptions, see pp. 4-5 *supra*, this provides further support for a holding that drug testing is not a mandatory subject of bargaining under the RLA.

[21] In enforcing that decision, the Seventh Circuit similarly noted that: "A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining provision of broader scope than that contemplated in the Railway Labor Act. . . . Congress in the instant legislation used the phrase, 'other conditions of employment,' instead of the phrase 'working conditions,' which it had used previously in the Railway Labor Act. We think it is obvious that the phrase which it later used is more inclusive than that which it had formerly used." *Inland Steel Co.* v. *National Labor Relations Board*, 170 F.2d 247, 254-255 (1948).

[22] See, also, *Telegraphers* v. *Ry. Express Agency*, *supra*, 321 U.S. at 346. See also, *e.g.*, under the NLRA, *First National Maintenance Corp.* v. *NLRB*, *supra*, 452 U.S. at 684 (while "current labor practice" is "not a binding guide," the fact that collective bargaining and agreement under the NLRA in regard to a particular matter is "relatively rare," adds further support to an interpretation "against mandatory bargaining").

CONCLUSION

For the reasons stated above and in the Brief for Appellant, the decisions below should be reversed.

Respectfully submitted,

RICHARD T. CONWAY
(Counsel of Record)
RALPH J. MOORE, JR.
D. EUGENIA LANGAN

SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

DAVID P. LEE
Vice Chairman and
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7200

Attorneys for the National Railway Labor Conference

November 28, 1988

No. 88-1

IN THE

Supreme Court of the United States

October Term, 1988

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Third Circuit

ALLIED PILOTS ASSOCIATION BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

MARTIN C. SEHAM
LEE R.A. SEHAM
SEHAM, KLEIN & ZELMAN
485 Madison Avenue
New York, New York 10022
(212) 935-6020

Attorneys for
Allied Pilots Association
Amicus Curiae

Of Counsel:
MARTIN C. SEHAM
LEE R.A. SEHAM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 88-1

IN THE

Supreme Court of the United States

October Term, 1988

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,

Respondents.

On Writ of Certiorari To The United States Court of Appeals for the Third Circuit

---

ALLIED PILOTS ASSOCIATION BRIEF *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief is submitted on behalf of the Allied Pilots Association (APA), an organization certified to represent American Airlines' pilots and certain "American Eagle" pilots, with the consent of the parties as provided for in the Rules of this Court. The airline and its pilots are governed by the Railway Labor Act.

The Company and its pilot employees had for many years worked together in establishing and fostering an Employment Assistance Program designed to detect and assist pilots who were victims of substance abuse, particu-

larly alcohol use. In 1984 the Company published rules, effectively prohibiting drug use by its pilots and other employees. APA, as the representative of the American pilots, was at least equally concerned with the Company's management for the safe operation of the Company's flights; for, as it is said ironically among the pilots themselves, "It is the pilot who gets to the scene of the accident first." It has always been clear that out of safety concerns for the public interest and for their own personal interest as well, the pilots continue to cooperate in an effective self-policing and detection program aimed at both drugs and alcohol use.

In March 1988, the Company, with little or no notice, composed new rules which imposed urine and blood testing requirements for the pilot group. The Company, unbeknown to APA, had been working on this program months before its announcement and had, in fact, retained the services of medical consultants to aid them. The key features of the American program involved either the addition of new obligations for the pilots or the modification of existing procedures for the detection and control of substance/alcohol abuse. The Company has taken the position that it is under no obligation to bargain concerning these rule changes and does not intend to do so. APA has filed suit in the Federal District Court for the Northern District of Texas where the case is still pending. This *Amicus* Brief is being submitted because there are certain fundamental issues of principle that affect all employee groups under the Railway Labor Act.

The petitioner's brief is founded on an erroneous premise which is wholly at odds with the purpose and de-

sign of the Railway Labor Act. That brief suggests that the carriers have a free hand in dealing with all labor relations matters which are either not traceable to the contract or related to customary practice (Brief p. 20). In those latter instances, the carrier concedes that there may be room to challenge its actions through the minor dispute settlement procedures. However, consistent with its thesis, the carrier would insist that all innovative decisions are its alone, regardless of the impact its decision may have on the working conditions of its employees.

The carrier's approach to management of the nation's transportation system is inconsistent with the origins of the Railway Labor Act. That statute is, perhaps, unique in the annals of labor legislation. The background of the Act is briefly set out in "The Railway Labor Act at Fifty: Collective Bargaining in the Railroad and Airline Industries" (National Mediation Board 1976). In the first chapter, written by Professor Charles M. Rehmus, the author points out that the original "proposal" had been drafted by the attorney of the railway labor organizations, Donald R. Richberg, and his assistant, David E. Lilienthal. Thus, it had the support of the railway labor organizations and was also backed by Samuel Gompers of the AFL (p. 7).

Congress did not act on the original proposal but, "During 1925, a committee of railway executives met with union representatives and a draft bill similar to the earlier . . . proposal was agreed upon." (p. 8)

The bill was presented jointly to Congress in January 1926 and Richberg testified:

> "I want to emphasize again that this bill is the product of a negotiation between employers and em-

ployees which is unparalleled, I believe, in the history of American industrial relations.

For the first time representatives of a great majority of all the employers and all the employees of one industry conferred for several months for the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community. They are now asking to have this agreement written into law, not for the purpose of having governmental power exerted to compel the parties to do right but in order to obtain Government aid in their cooperative efforts and in order to assure the public that their interest in efficient continuous transportation service will be permanently protected."

Professor Rehmus then goes on to conclude, p. 8,:

> "The underlying philosophy of the law was, as it still is, almost total reliance on collective bargaining for the settlement of labor-management disputes."

The petitioner is correct in suggesting that the ultimate purpose of the Railway Labor Act is to prevent interruptions of service in two vital transportation industries. The means adopted by Congress to achieve this goal is, however, the collective bargaining process. Petitioner is wrong in fact and wrong in theory in suggesting that the Act supports imposition of change by fiat as the preferred means for preventing interruptions in transportation service.

At least implicit in the petitioner's management rights anti-bargaining theme is the notion that negotiations come only at the expense of expediency and efficiency. This is the same argument that is always made against a collective

or democratic process of decision-making and there have been those who have believed that the ultimate value is to "have the trains run on time" regardless of whether the rails ran right through the heart of democracy.

Congress made a determination that the carriers and their unions were responsible enough to be the authors of the legislation itself. That legislation leaves in the *joint* hands of the carriers and their unions the responsibility for administering labor relations. The major means authorized by the law is the collective bargaining process.

If the conditions of our society warrant the imposition of a drug testing program, it can be readily believed that such a program will be better designed and more effectively applied to employees when it is the product of the joint decision of carrier and union. *See Sadler and Horst,* "Company/Union Programs for Alcoholics", Harv. Bus. Rev.—Sept. Oct. 1972, p. 22. Such joint agreements have been reached in other industrial relations contexts (*see* extract from Seafarers International Union/Great Lakes contract attached hereto as an appendix) and there is no reason to believe that agreements will not be reached in those industries governed by the Railway Labor Act. Indeed, the drug testing program unilaterally implemented by American Airlines is invalid under the new FAA regulations, in part, due to its failure to provide sufficient safeguards against employee harassment and invasion of privacy. Moreover, the RLA does not permit either carrier or union to indefinitely thwart the will of the other. Upon the exhaustion of the RLA's procedures, the carrier has the right to implement the proposals it has made. The Act does not, contrary to petitioner's view, permit interminable negotia-

tions and dispute processing. The whole collective bargaining timetable is effectively in the hands of a Government Agency, the National Mediation Board.

That Board can make a decision that bargaining has reached an impasse or that mediation has failed and the parties must be "released" to take their own course. The Board has the authority and capacity to schedule negotiations and mediation sessions on an accelerated or deferred basis and no practitioner in the field will dispute the fact that the Board utilizes its discretion in these matters as its judgment is influenced by matters of public policy and public concern.

Finally, it is only a "scare" tactic used with the court to suggest that the bargaining procedures of the Railway Labor Act will inevitably result in destructive self-help. As we have noted, the vast majority of negotiated issues are resolved by mutual agreement. Even issues left to implementation by one of the parties will, if negotiations have been performed in good faith, bear the marks and modifications of the bargaining process and stand on a far more acceptable basis than a program unilaterally proclaimed and imposed. Moreover, petitioner's thesis assumes an irresponsibility of response by the unions which Congress did not share when it gave over to management and labor the administration of the Act. Petitioner, to make his argument, must posit a scenario in which the unions involved have acknowledged the existence of some species of drug problem, where there has been good faith bargaining and opportunities to review and revise a testing program, where the Federal Government has established by regulation at least the parameters of a drug control pro-

gram, and, notwithstanding all those considerations, the union calls a strike to cripple a carrier. Such a scenario runs contrary to common sense and reflects a numbness to the realities facing the working man and his unions. To name the demon, "strikes" are dangerous and difficult things. They involve the generation and maintenance of employee support; they put in jeopardy the employee's livelihood and benefits; they may well damage the corporate vehicle on which his job depends; they weaken the union's reserves of strength to press for other gains and benefits. In short, it staggers the imagination to believe that a strike would inevitably follow from unsuccessful negotiations held in good faith to define the drug testing program. If the carriers' program did not ultimately receive the agreement of the union, it would be far more likely that the union would simply leave to another day its further negotiations and attempts to modify a program.

Regulations have been issued by the various transportation agencies under the jurisdiction of the Department of Transportation requiring the carriers to establish drug testing programs. In each instance, the burden is put upon the carrier to develop a program for submission to the controlling agency. In some instances, e.g., 53 Fed. Reg. 47041, aspects of the program such as the development of an Employee Assistant Program, are specifically left to the collective bargaining process. Assuming that the regulations are valid, there is no reason why the requirements of the Railway Labor Act for joint development and administration of industrial relations policy cannot be harmonized with the substantive and procedural (time) requirements of the regulatory agencies. Not only will the purposes of all the applicable laws be served, but the end product is

bound to be better. *Norfolk and Western Railway Company* v. *Brotherhood of Locomotive Engineers*, 459 F. Supp. 136, 144 (W.D. Va. 1978). *See also Gulf Power Company*, 156 NLRB 622 (1966), *enforced sub. nom., NLRB* v. *Gulf Power Co.*, 384 F.2d 822 (5th Cir. 1967); *Plough, Inc.*, 262 NLRB 1095 (1982).

Dated:

Respectfully submitted,

SEHAM, KLEIN & ZELMAN

By _____

MARTIN C. SEHAM
485 Madison Avenue
New York, New York 10022
(212) 935-6020
Attorneys for
Allied Pilots Association
Amicus Curiae

Of Counsel:
MARTIN C. SEHAM
LEE R.A. SEHAM

APPENDIX

APPENDIX

Extract from SIU/Great Lakes Labor Contract

SECTION 42. *Drug Screening*: It is agreed that the Company, at its sole option without prejudicing its right to discipline, in order to provide for the safety and well-being of the employees of the Company, Company property, and the public in general, herewith establishes policy and procedures concerning substance abuse and drug testing while in the employ of the Company.

1. Substance abuse shall be defined to include:

a. The *abuse* of legal drugs, including prescription or over-the-counter drugs and alcohol.

b. *Use* of any illegal drug or chemical substance including marijuana, cocaine, heroin, amphetamines (speed). etc.

2. Employees may be required to submit to drug testing (urinalysis or breathalyzer) in the event reasonable grounds exist which indicate the employees involvement with substance abuse. Reasonable ground will include:

a. Irrational, insubordinate, or bizarre behavior which is not in keeping with good order and discipline.

b. Eyewitness reports which indicate that an employee may be using, distributing, possessing, or selling illegal or unauthorized prescription drugs.

c. Documented declining job performance.

d. Involvement in an accident or casualty where use of drugs or alcohol is suspected.

e. Proven evidence that the employee has a previous record of drug abuse.

f. Other reasons which may be mutually agreed upon by the Union and the Company.

3. When an employee is asked to submit a drug screen urinalysis test at the Company's expense, it shall be performed by a laboratory certified to perform such test. As soon as practical, the Union must be notified of the reasons for the test and the results.

4. If the employer refuses to submit to such a test under the circumstance defined above, the employee may be subject to discipline; however, if either the employee or employer wishes to pursue the matter any further, it should be referred to the Great Lakes Seamen's Appeals Board or processed through the grievance machinery, whichever is applicable.

5. If the employee agrees to submit to the test and the results are negative, the matter shall not be pursued any further, and the employee shall be compensated for any wages, benefits, or other contractual rights lost as a result of the testing procedure.

6. If the initial test results are positive, the employee shall have the right to have the sample used for the initial test retested a second time at employer's expense in another certified laboratory using the most accurate methods available.

7. If the results of the second test are positive, the employee shall have the option of *immediately* seeking rehabilitation at the Seaferers Chemical Abuse Center at Piney Point, Maryland or any other facility approved by the

GLSAB which may include short-term, out-patient treatment if evaluation indicates that to be appropriate.

8. If the employer chooses not to avail himself or herself of such an opportunity or he or she is unable to successfully complete such a program, either the employer or the employee can pursue the matter to the Great Lakes Seamen's Appeals Board or through the grievance machinery, whichever is applicable.

9. If the employee successfully completes a rehabilitation program as outlined above, the employee shall have absolute right to be reinstated to his or her job without loss of seniority.

10. A Company may exercise the provisions of this clause only after it has a written policy on employee assistance and chemical abuse and makes a copy of that policy available to the Union.